

RDY 28

In the Matter of:

FTC v. Innovative Marketing

September 9, 2010
Scott R. Ellis

Condensed Transcript with Word Index



For The Record, Inc.
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<p>1 FEDERAL TRADE COMMISSION 2 I N D E X 3 WITNESS: 4 SCOTT R. ELLIS 5 BY MR. ARENSON 5 BY MS. GURLAND 296 6 7 EXHIBITS DESCRIPTION FOR ID 8 Number 1 Scott R. Ellis Report 40 9 Number 2 ErrorPatrol Screen Shots 168 10 Number 3 System Detection List 175 11 Number 4 ErrorPatrol Screen Shots 201 12 Number 5 Microsoft Website Screen Shot 204 13 Number 6 ErrorPatrol Screen Shots 207 14 Number 7 ErrorPatrol Screen Shots 217 15 Number 8 OnGuard Online Screen Shots 228 16 Number 9 PerformanceOptimizer Screen Shot 231 17 Number 10 WinFixer Screen Shots 241 18 Number 11 Westcoast Labs Report 263 19 Number 12 Johnson Rebuttal Report 272 20 Number 13 Value Click Advertisements 283 21 22 OTHER EXHIBITS REFERENCED PAGE 23 None 24 25</p>	<p>1 3 2 3 APPEARANCES: 4 5 ON BEHALF OF THE FEDERAL TRADE COMMISSION: 6 ETHAN ARENSON, Attorney 7 COLLEEN ROBBINS, Attorney 8 Federal Trade Commission 9 600 Pennsylvania Avenue NW 10 Washington, DC 20580 11 (202) 326-2351 12 13 ON BEHALF OF DEFENDANT KRISTY ROSS: 14 CAROLYN GURLAND, Attorney 15 Law Office of Carolyn Gurland 16 2731 North Mildred Avenue 17 Chicago, Illinois 60614 18 (312) 420-9363 19 20 21 22 23 24 25</p>
<p>1 IN THE UNITED STATES DISTRICT COURT 2 NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION 3 4 FEDERAL TRADE COMMISSION,) 5 Plaintiff,) 6 v.) Case No. RBD 08-CV-3233 7 INNOVATIVE MARKETING, INC.,) 8 et al.,) 9 Defendants. 10 11 Wednesday, 12 September 30, 2010 13 14 Suite 4200 15 Winston & Strawn 16 35 West Wacker Drive 17 Chicago, Illinois 60601 18 19 The above-entitled matter came on for 20 deposition, pursuant to notice, at 10:30 a.m. 21 22 23 24 25</p>	<p>1 4 2 P R O C E E D I N G S 3 - - - - - 4 MR. ARENSON: On the record. Mr. Ellis, my name 5 is Ethan Arenson. I represent the Federal Trade 6 Commission in this matter. Why don't we start with 7 having counsel introduce themselves. 8 MS. ROBBINS: Colleen Robbins from the Federal 9 Trade Commission. 10 MS. GURLAND: Carolyn Gurland, G-u-r-l-a-n-d, on 11 behalf of the Defendant Kristy Ross. 12 MR. ARENSON: And, Carolyn, Marc's counsel, I 13 take it, will not be participating today? 14 MS. GURLAND: I did not know that. The last I 15 heard they were. Should we check with them before we go 16 on the record? I hadn't heard anything. Do we know 17 that they might not? 18 MR. ARENSON: Why don't we go off the record for 19 a second. 20 (An off-the-record discussion was had.) 21 MS. GURLAND: Back on the record. Counsel for 22 Marc D'Souza will just get the transcript. 23 MR. ARENSON: Okay. Why don't we just confirm 24 that on the record. We have talked to counsel for Marc 25 D'Souza and they have elected not to participate today. Mr. Ellis, we're here today in connection with</p>

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1 FTC versus Innovative Marketing, Case No. 08-CV-3233,
2 filed in the district of Maryland. Have you been sworn
3 by the reporter yet?

4 THE COURT REPORTER: No.

5 MR. ARENSON: Why don't we go ahead and take
6 care of that then.

7 SCOTT R. ELLIS,
8 a witness, called for examination, having been first
9 duly sworn, was examined and testified as follows:

10 EXAMINATION

11 BY MR. ARENSON:

12 Q. Mr. Ellis, we'll go over some ground rules. I
13 understand this isn't your first deposition.

14 A. That's correct.

15 Q. We'll go over briefly some ground rules so
16 we'll -- my sense is you understand how this works.

17 I will be asking the questions today. Let me
18 finish my question before you go ahead and start
19 answering. That will make sure the transcript is clear.
20 If you don't understand any question that I have asked,
21 just go ahead and ask me to rephrase it or explain it,
22 and I'm happy to do that. If you do go ahead and answer
23 one of my questions, I'll assume you did understand the
24 question. If you need to take a break at any point
25 today, let me know, and I will be happy to accommodate

1 A. Yes.

2 Q. What did you guys talk about?

3 A. Just in general about how to answer -- you know,
4 to answer questions truthfully, fully, to the best of my
5 ability and to make sure that I have a -- you know, the
6 question's are clear and that I understand the question
7 being asked and to not, you know, get too excited and
8 answer questions too quickly or talk too much about --
9 you know, just try not to over-explain things and that
10 kind of stuff. Just pretty standard stuff.

11 Q. Uh-huh. Were there any questions you asked her
12 that you can remember?

13 A. No. I don't think there was anything that I had
14 in particular that I asked about. I mean, I think I
15 might have just asked, you know, is it going to go all
16 day, is it going to go past 5:00, stuff like that.

17 Q. Those are good questions. Hopefully we'll try
18 to avoid that.

19 A. Do I get lunch.

20 Q. All good questions.

21 Other than Ms. Gurland, any other counsel you
22 have spoken with? Mr. Kirsch?

23 A. No.

24 Q. And has that been true of your entire, say,
25 employment as an expert? Is it just Ms. Gurland that

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8

1 that. If you hear your defense attorney make an
2 objection at any point today, you can go ahead and
3 answer the question as I've stated it unless she
4 specifically instructs you not to.

5 A. Okay.

6 Q. And is there any reason today you can't give us
7 your best testimony, such as drugs or alcohol or
8 medication?

9 A. No.

10 Q. Okay. And all the instructions I have given you
11 make sense?

12 A. Yes, sir.

13 Q. Okay. Why don't we get started with some
14 background information. What have you done to prepare
15 for today's deposition?

16 A. I have, you know, looked through the reports
17 that I have. The -- my own report, the Kevin Johnson
18 report.

19 Q. Let's break that out just a little bit.

20 So your report, I'm definitely familiar with,
21 that's the Ellis report. Now, Johnson had two reports.
22 Did you look at both of them or just the original one?

23 A. I believe I looked at both of them.

24 Q. Okay. And anything else you did to prepare for
25 today's deposition? Did you speak with Ms. Gurland?

1 you have spoken or have there been other attorneys that
2 you've spoken with?

3 A. Ms. Gurland has been my point of contact in this
4 case.

5 Q. Okay. And have you read any of the deposition
6 transcripts prior to today's deposition?

7 A. No.

8 Q. So no deposition transcript in the case at all.

9 A. No, not at all.

10 Q. Okay. Thank you.

11 All right. Why don't we get into the areas in
12 which you believe you are qualified to give expert
13 testimony.

14 A. Okay.

15 Q. And we'll just start listing them, and I'll
16 start writing them down.

17 A. Sure. With respect to computers, generally
18 speaking when it comes to computer hardware, I'm very
19 well-versed in network architecture, firewalls, servers,
20 SAN devices, load balancers, you know, attached storage
21 of any kind, database technologies such as MSSQL,
22 applications, software applications, the use of software
23 applications and business applications in --

24 Q. Let me slow you down just a little bit. If we
25 are going to go -- the first one I had was computer

9

11

1 hardware. So if we're moving on to No. 2, just let me
2 know so I can keep them straight.

3 A. Okay. And certainly I'm not going to be able to
4 think of every single thing -- I have been working in IT
5 since 1987.

6 Q. Sure. Let me see if I can focus --

7 A. The scope is really, really broad of what I have
8 worked with in the past.

9 Q. Maybe I can focus you then. What areas of
10 expertise did you draw on in preparing your report?

11 A. I think my forensic skills were vital to me. My
12 software analysis skills. My understanding of how the
13 Internet works, of how websites interact with users as
14 an application. I have done extensive work with
15 websites as applications.

16 Q. How the Internet works is a little bit broad.
17 Can we drill down on that a little bit?

18 A. Yeah. I think that anything to do with the HTTP
19 protocol, HTTPS, FTP, Telenet. There is a number of
20 technologies that are leveraged by the Internet to
21 create the whole Internet, SMTP, POP, MAPI, M-A-P-I.

22 Q. Okay. Anything else with Internet
23 infrastructure?

24 A. Again, firewalls and security software. I have
25 done a lot of work with Internet security in the past.

1 A. Well, I think I asked you first. I will answer
2 your question.

3 My definition of an expert would be somebody
4 that knows a lot about a subject area and is somebody
5 who people -- you know, kind of like a go-to guy.
6 Somebody that people go to when they have a problem and
7 somebody that can root out what the problem is and
8 what's causing it and can identify the root cause.

9 This person is probably very good at identifying
10 root causes and being able to run the tools that are
11 needed to do network monitoring. Tools like Wireshark.
12 Tools like HTTP Watch, is a good one. Javin, that's
13 another packet analysis software tool. You know,
14 Processmon, Perfmon, being able to get a sense for
15 what's going on, having all the tools and knowing how to
16 use them.

17 Q. Now, those tools you just mentioned, are those
18 relevant to security software or are those more just
19 general --

20 A. Those would be relevant to security definitely.

21 Q. Security software.

22 A. I'm not sure I understand the question.

23 Q. You told me about a bunch of tools that you are
24 familiar with. Perfmon, I think, is one of them. I
25 know you used some of that in your report. Is that

10

12

1 Q. You are an expert at security software?

2 A. I would say so.

3 Q. Okay. What qualifies you as an expert at
4 security software?

5 A. I have been working with it for many years. It
6 is part of my job. It is part of what I do. It is part
7 of my troubleshooting in my day-to-day work that I do
8 now as well as for the past, you know, nine years, maybe
9 more.

10 Q. And can you be any more specific? There are a
11 lot of different types of security software out there, I
12 would imagine. Can you tell me what specific types of
13 security software?

14 A. Certainly different types of firewalls have
15 different applications that run on them, do things like
16 proxying. Antivirus software I have set up and, you
17 know, and -- that's not a word -- antivirus, virus
18 removal software, malware, adware.

19 Q. So you feel you are an expert in all of those
20 areas?

21 A. It is part of what I do. You know, it depends
22 on what your definition of expert is. I have certainly
23 worked with these things to a great extent.

24 Q. So you have stolen my next question, which is
25 what is your definition of an expert?

1 directly relevant to security software, is my question?

2 A. If you were doing -- if you were looking at a
3 problem and you were trying to establish what the need
4 was, what the circumstances are, and what software tool
5 you needed to use to remedy a problem or to set up a
6 security perimeter, you would want to evaluate the
7 network first and find out what's what, what's where,
8 and how is it all set up and how is it all
9 interoperating, what ports are being used.

10 And these are all tools you would use in
11 evaluating like an enterprise situation where you had a
12 need for security. You don't want to just come in and
13 say oh, here, use this piece of software. First you
14 want to know what the problem is or what they are doing.
15 You don't want to install a piece of software on a
16 server and have everything on that server break.

17 That just happened to me the other week. It was
18 a piece of software that requires the use of SMTP but
19 somebody had installed an antivirus software on the
20 machine without looking to see what's going on on the
21 machine first. So the SMTP broke and the software could
22 no longer send e-mails. So that would be probably a
23 good example.

24 Q. Okay. Now, with respect to security software,
25 have you ever worked for a security vendor?

13

1 A. I was -- when I worked for Computer Bits, we
2 were what you would call a re-seller, a certified -- I
3 guess we were a certified re-seller of a company called
4 E-Soft.

5 **Q. And did that entail writing code for the**
6 **software or just selling it?**

7 A. It involved installing it and setting it up.

8 **Q. Okay. So you were involved in installing it,**
9 **setting up security software?**

10 A. Right. And with respect to security, my
11 experience with security has been in application
12 development and writing applications to prevent things
13 like sequel injection, cross-site scripting.

14 **Q. And I want to focus just for the moment on**
15 **security software, antivirus, antimalware software just**
16 **for a minute.**

17 A. Sure.

18 **Q. Now, you said your experience with Computer Bits**
19 **is relevant to that expertise that we are talking about.**
20 **Any other experience that is relevant to your expertise**
21 **at security software itself?**

22 A. Yeah. I have deployed security solutions in
23 many locations on many computers.

24 **Q. And that's, again, installing the software?**

25 A. Yes. Installing it, making sure that it is

14

1 working properly, rooting out viruses, fixing them
2 manually if needed, going into a person's computer when
3 it's maybe -- for example, like a zero day virus is one
4 where there is no virus definition for it, and you might
5 have to go into the registry and start looking for where
6 it is; go into the startup run files to see why is the
7 software re-installing itself and stop it from doing
8 that, and then, if needed, submit the -- the findings to
9 a security company.

10 **Q. Okay. Have you ever written code for a security**
11 **software program?**

12 A. No.

13 **Q. And other than your experience installing and**
14 **configuring security software, is there other experience**
15 **you have that would be relevant to your expertise with**
16 **security software?**

17 A. No.

18 **Q. Let's talk about on-line advertising. Do you**
19 **claim to be an expert in on-line advertising?**

20 A. I have done quite a bit of work with on-line
21 advertising. I worked for a company called Art.com in
22 1998, and we had an affiliate marketing program, and I
23 was a technical project manager and I worked side by
24 side with the affiliate marketing manager to make sure
25 that we could support the affiliate program with the

15

1 Art.com software.

2 **Q. And that was back it in 1998?**

3 A. '98, '99. And then in 2000 I worked for Leo
4 Burnette, which is actually in this building, for their
5 web division for a few months. For like five months.

6 **Q. And were you involved in on-line advertising**
7 **there?**

8 A. Yeah. We did the Go Army, the Army-of-One
9 campaign.

10 **Q. Uh-huh. And what was your role specifically?**

11 A. I was a web producer.

12 **Q. What does that mean?**

13 A. I helped manage deliverables to the U.S. Army on
14 what we were putting together so far as like the
15 advertising campaign, the on-line campaign.

16 **Q. So did you do the targeting of where those ads**
17 **would end up? I guess I need more information.**

18 A. I helped develop the ads and made sure that the
19 deliverables and the schedules were met.

20 **Q. Did you interact with the on-line ad networks**
21 **that actually displayed these ads?**

22 A. Not directly.

23 **Q. And have you had any -- throughout your entire**
24 **career have you had any experience with on-line ad**
25 **networks placing ads?**

16

1 A. Only with respect to trying to stop them when
2 they would get aggressive or, you know, dumping a lot of
3 cookies on a person's computer, creating problems with
4 trying to install software on people's computers, things
5 like that, just from a security standpoint.

6 **Q. I would like to talk about that, but let me**
7 **round out the first question, which was I had asked if**
8 **you had ever placed an ad or directly dealt with an**
9 **on-line advertising agency in the context of someone**
10 **placing an advertisement.**

11 **What's the answer to that question?**

12 A. I think that I have had that experience. I
13 can't specifically recall it, but I certainly -- when I
14 worked for Art.com I would be in meetings where we would
15 be talking to like the actual affiliate marketer who is
16 placing the banner ads for us. I certainly have that
17 understanding of how that technology works.

18 **Q. So you would hear from the affiliate marketer**
19 **how the ads were being placed, but you didn't directly**
20 **place them yourself.**

21 A. No. No. I didn't directly say, here's a banner
22 ad, put this on your website.

23 **Q. And have you ever been involved in targeting of**
24 **ads to users?**

25 A. I would say not directly, no.

17	19
<p>1 Q. Now, you mentioned before -- I want to get back 2 to -- and I don't want to put words in your mouth. You 3 said there were aggressive ads that you would actually 4 communicate with on-line ad services about? Am I 5 getting that right?</p> <p>6 A. No.</p> <p>7 Q. Explain to me what you meant.</p> <p>8 A. Like my clients -- one of my clients would be 9 experiencing like lots of popups, for example, and they 10 would say I want the popups to stop.</p> <p>11 Q. So a client would say to you that one of my 12 users is getting popups on their screen and ask you to 13 fix the problem?</p> <p>14 A. That's correct.</p> <p>15 Q. And do you remember what kind of popups you were 16 dealing with?</p> <p>17 A. Usually they were pornographic.</p> <p>18 Q. Do you ever recall any of these popups trying to 19 sell something?</p> <p>20 A. Pornography.</p> <p>21 Q. They were trying to sell pornography?</p> <p>22 A. Sure.</p> <p>23 Q. Any other instances other than pornography?</p> <p>24 A. Sure. I have seen popups that would be trying 25 to sell you things to, you know, clean your computer,</p>	<p>1 The method -- that would be the method as to -- you 2 know, to tell people your computer may be infected, 3 click here to run the scan.</p> <p>4 And certainly you go to websites like Panda or 5 McAfee or any of the security websites, they will say 6 similar things; that your computer could be infected 7 with viruses. You should download our free scan utility 8 and scan your computer. I think that's a really common 9 practice.</p> <p>10 Q. Let's actually talk about that, because I think 11 there is a distinction -- and correct me if I'm wrong -- 12 about a popup ad that claims to be running a scan and an 13 application that's downloaded from a Panda software, for 14 example, and running on your computer. Is there a 15 distinction there?</p> <p>16 A. I don't think -- I certainly remember seeing 17 like popups trying to get me to, you know, scan things, 18 and they were some of the more familiar companies. I 19 can't name them specifically, but certainly I think in 20 the past 10 years everybody's been guilty of overusing 21 the popup.</p> <p>22 Q. Okay.</p> <p>23 A. It's definitely a problem -- or it was an 24 extreme problem at one point where every website you 25 would go to there would be popups.</p>
18	20
<p>1 clean your PC, those kind of things.</p> <p>2 Q. Is that known as scare-ware in the industry?</p> <p>3 A. Yeah, I believe that's the correct term.</p> <p>4 Q. And these are popup ads that try to intimidate 5 or scare users into buying rogue software. Is that a 6 generally accepted definition of scare-ware?</p> <p>7 A. Yeah, I believe that would be.</p> <p>8 Q. Do you recall what those ads said when you saw 9 them on the screen?</p> <p>10 A. No, I can't -- I can't recall any specific -- 11 any specific case, no.</p> <p>12 Q. Was it multiple cases or just once? How many 13 times did this happen?</p> <p>14 A. I couldn't tell you. I have worked with 15 thousands of users in the past 10 years.</p> <p>16 Q. And you don't by any chance remember any of the 17 products being sold in these popups?</p> <p>18 A. No.</p> <p>19 Q. Are you 100-percent certain that they are not 20 the products discussed in your report?</p> <p>21 A. I can't be 100-percent certain about that no, 22 because I don't remember anything specifically so --</p> <p>23 Q. Okay. Do you recall if any of these scare-ware 24 ads involved a free scan?</p> <p>25 A. Yeah. That sounds -- that sounds reasonable.</p>	<p>1 Q. Popup Blocker helped put a dent in that market; 2 is that fair to say?</p> <p>3 A. Yes. And there were popups to get a popup 4 blocker too, right? I used to call it popup popcorn. 5 Especially with the pornography ones, you could 6 experience a blitz creed of popups and the only thing 7 you could do is just hit the power button and kill your 8 computer to make it stop.</p> <p>9 Q. Right. And when this happened, the users would 10 complain to you about the volume of the popups they were 11 using?</p> <p>12 A. Yeah. They would lose control of their computer 13 the popups would be so bad, and I think part of it was 14 attempts to get you to click on things that would cause 15 like a file -- like file-open dialogue, like how when 16 you click on it and then it says you need to open this 17 file and then you click open and next thing you know 18 there is viruses and all kinds of crazy stuff happening 19 to your computer.</p> <p>20 That happened to me one time. I can't remember 21 the exact year. It was probably around 2002. I went to 22 a -- I was looking for the lyrics to a song. Lyrics 23 websites were one of the really bad ones, so I was 24 looking for the lyrics to a song and the next thing you 25 know I'm getting all these popups and next thing you</p>

21

23

1 know there is a file installing on my computer. And I
 2 was using -- what was I using. Zone Alert. I was using
 3 the free version of Zone Alert at the time, and I came
 4 to find out later that the free version of Zone Alert
 5 did not monitor or block or protect you from website
 6 attacks, so my computer literally got hacked while I was
 7 sitting there watching it happen, and Zone Alert was
 8 telling me all about it saying that this file is
 9 requesting to download from another website. And it
 10 was -- in the end I just powered off the computer and
 11 pulled the hard drive and attached it to another
 12 computer and cleaned it.

13 **Q. Have you heard those type of ads referred to as**
 14 **auto downloads or forced downloads before?**

15 A. Yeah, I believe that would be correct. I'm not
 16 sure about auto downloads but the word works for me.

17 **Q. Okay. And have you had complaints from users**
 18 **that when they receive one of these downloads, or forced**
 19 **downloads, that they just click without thinking and**
 20 **actually end up installing things on their computer.**
 21 **Does that happen?**

22 A. I did have that happen once where it was the
 23 vago virus, and the vago virus was one that was going
 24 around in 2005. It was -- there was lots and lots of
 25 versions of that because the original author of the

1 talking about computer users and 5J.

2 BY MR. ARENSON:

3 **Q. This is just a random question but you can go**
 4 **ahead and read your report, if you would like.**

5 I was wondering your opinion, do you think users
 6 in general are sophisticated or unsophisticated when it
 7 comes to the Internet?

8 A. In general, no. In general most users -- it is
 9 in my report that people can show an alarming
 10 misunderstanding of technology. They really can.

11 **Q. Okay. So in general many users are not very**
 12 **sophisticated.**

13 A. That would be true.

14 **Q. That was just a background question, but you**
 15 **have your report now.**

16 Now, in connection with these unsophisticated
 17 users, when they would see popup windows telling them to
 18 conduct a free scan or what ever else was being sold
 19 through these windows, was it your experience that the
 20 users would sometimes just click because they didn't
 21 know any better or thought that that was the right
 22 action?

23 MS. GURLAND: Wait. So you are asking for him
 24 to speculate about an unsophisticated user that he is
 25 working with, or what he thinks that -- in his

22

24

1 software had posted the code for it on a news group so
 2 anybody could basically download this virus and
 3 recompile it to do what they wanted it to do.

4 And I did have a user who her -- I believe her
 5 husband worked in security -- her husband worked in
 6 security and she got an e-mail that said, you know, you
 7 need to install this antivirus tool and it looked like
 8 it was from her husband so she installed it and it was
 9 the vago virus. And the next thing you know her
 10 computer was an FTP server and it was sending e-mails
 11 out and distributing the virus further and that would be
 12 what I would really call a problem.

13 **Q. Uh-huh. Now, you have talked in your report --**
 14 **and we'll get into it a little bit later -- about users**
 15 **in general aren't very sophisticated about how the**
 16 **Internet works and technology in general. Is that a**
 17 **fair assessment of what you said?**

18 A. I would say it depends on the users, but
 19 certainly I have worked with users that had that.

20 **Q. Do you think it is common that users aren't very**
 21 **sophisticated about how the Internet works?**

22 Carolyn is showing you your report.

23 MS. GURLAND: Just for the record, I'm giving
 24 him a copy of his report, because this is on a computer.
 25 Just to direct you, this is the Section 5 we were

1 experience or what he thinks an unsophisticated user
 2 might do?

3 MR. ARENSON: That's a fair clarification.

4 BY MR. ARENSON:

5 **Q. In your experience with an unsophisticated**
 6 **user -- which you have said that's what most users are;**
 7 **right?**

8 A. Yes.

9 **Q. There is the question. In your experience with**
 10 **most users, what has been their reaction when they see,**
 11 **for example, a popup window trying to tell them**
 12 **something?**

13 A. With most users, even the unsophisticated users,
 14 most of them know not to click on things like that.
 15 Most of them do but there are some that don't. You
 16 might have a new user in the mid -- 2004, 2003, a lot of
 17 people were new to the Internet. I think at this stage
 18 in 2010 it is a different story, but in the beginning,
 19 sure, people would click on things they shouldn't click
 20 on. That would happen.

21 Would most users click on it? No. No. Most
 22 users would know that the firm they are working for had
 23 security software and they would recognize that it was
 24 an ad and they should click off of it and go and do
 25 something else.

25

1 Q. So in the complaints that you received, were
2 there instances where users did indeed click on an ad
3 and, for lack of a better description, got themselves in
4 trouble?

5 A. Yeah. Sure.

6 Q. Now, that was a bit of a detour from on-line ad
7 serving. We are going to get back to that.

8 Have you ever worked with Mediaplex in your
9 career?

10 A. Not directly, no.

11 Q. Are you familiar with Mediaplex's MOJO adserver?

12 A. Not directly. I have heard of Mediaplex. I am
13 not intimately familiar with how the service works.

14 Q. What about the MOJO adserver in particular?

15 A. No, I don't -- Mediaplex serves up banner ads,
16 targeted banner ads, to people and perhaps the MOJO
17 server is what does it. I don't know.

18 Q. Do you know for sure?

19 A. No, I don't know for sure. I could Google it,
20 though, and find out.

21 Q. I'm sure that's true. How about the Value Click
22 Media Network?

23 A. Again, I have seen their cookies. I'm familiar
24 with them.

25 Q. What's the connection between the Value Click

1 of those two, IIS or Apache, most likely. Could be
2 something else. Could be their own system they have
3 custom developed.

4 Q. You are just not sure.

5 A. I'm not sure. I think the underlying
6 technologies, the core technologies, behind it are all
7 the same. The HTTP request is made and an HTTP response
8 is returned, and the documents and the imaging are
9 served up to the user.

10 Q. What type of targeting options are available on
11 the Mediaplex network, if you know?

12 A. So far as demographics?

13 Q. Any type of targeting.

14 A. It would be speculation. I can't speculate to
15 that. I mean, I could speculate if you wanted me to.

16 Q. Nope.

17 A. It would be speculation.

18 Q. Because you don't have any background in the
19 Mediaplex adserver system.

20 A. No.

21 Q. What about other adserving systems?

22 A. In what respect?

23 Q. Fair question. I'm going to try to break this
24 into two categories. My sense is you have a general
25 understanding and a high-level understanding of the

27

26

1 Media Network and Mediaplex, if you know?

2 A. I don't know.

3 Q. Were you familiar with the IAB?

4 A. No.

5 Q. They are impression measurement guidelines?

6 A. No, I'm not familiar with the exact guidelines.
7 I'm certainly familiar with impressions and the
8 difference between impressions and click-throughs.

9 Q. So is it safe to say you are not an expert on
10 on-line ad serving?

11 A. I'm an expert in the technology that underlies
12 how that works.

13 Q. Okay. Well, what technology does Mediaplex use
14 to serve their ads?

15 A. They use web servers, HTTP, HTML. They have
16 graphics that they use. They check for cookies to see
17 if they can target an ad. There is IDs that are
18 floating around. There is a central database that's
19 being accessed that lists all the people that they have
20 marketing demographics on, and they target ads in that
21 manner.

22 Q. What software runs on the MOJO adserver?

23 A. I couldn't tell you. I would have to work there
24 or I would actually have to do a scan of their system to
25 find out. It is likely IIS or Apache. It would be one

1 infrastructure of the Internet, how things are
2 transmitted over the Internet, and that's the expertise
3 that you are talking about when you say that you
4 understand how ads are served on the Internet; is that
5 correct?

6 A. Yeah. And I think that if somebody put the code
7 down in front of me or allowed me access to the system
8 to review and examine, I would be able to make sense of
9 it. I would be able to diagram and tell you exactly how
10 it works without any problems whatsoever.

11 Q. Because you understand how images, for example,
12 are displayed on the Internet.

13 A. Yes. And I understand Java Script and I
14 understand the ASP. I understand HTML. I understand
15 XML. These are the technologies that I know, and when
16 an application is put in front of me, a web-based
17 application, I can pick it apart and determine how it
18 works.

19 Q. Uh-huh. But information specific and
20 proprietary to an ad network, like Mediaplex, you don't
21 have any background in that.

22 A. I don't have any access to it, how would I?

23 Q. I completely agree with you. How would you
24 because you don't have any access.

25 A. Right. But what I do know is how these -- when

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1 I see an ad on a web page, I can understand how that web
2 page that I'm seeing works, and I can understand that
3 the ad that I'm seeing is actually coming from somewhere
4 else and it is not, for example, coming from -- you
5 know, if I go to Yahoo.com, I might see 16 different
6 banner ads on there, and I understand those aren't being
7 hosted by Yahoo. Those are coming from people that are
8 serving up these ads. These are coming from people like
9 Mediaplex and Value Click.

10 **Q. Right. Understood all of that.**

11 A. And I think did we say Doubleclick. I think
12 there is one called Doubleclick too. There is a lot of
13 these companies and I can't even remember the names of
14 the ones that I've worked. But we worked with companies
15 like this, if not these, when I was at Art.com.

16 **Q. But at no time at Art.com did you directly place
17 ads or target ads to users; is that correct?**

18 A. I think I answered that question already.

19 **Q. You can answer it again.**

20 A. Yes, that's -- I believe that's -- I have worked
21 with the people in that process, but did I actually put
22 together an e-mail and send it directly to someone
23 there? No. But I certainly was involved in everything
24 that went on to support that activity.

25 **Q. Well, there is more than just sending an e-mail,**

1 wealth of information about the consumer that's
2 available now than was available in 1998 when the
3 Internet was in its infancy.

4 **Q. What about targeting options, as far as
5 targeting of ads or sophistication of targeting, has
6 that changed dramatically since 1998?**

7 A. Well, the basic way that the Internet functions
8 hasn't changed that much since 1998. It is still based
9 on the HTTP protocol, TCP/IP. You have an IP address,
10 you have a Mac address for a machine, if you can get it,
11 and then you know who the person is based on, you know,
12 cookies that they might have on their computer or the IP
13 address they are coming from.

14 So, really, the way that you would identify a
15 user hasn't changed but the amount of information that
16 you have available about that user and his activity has
17 increased because the databases that are out there are
18 better able to bring the data in, put it into like a
19 data warehouse or into a format that's -- there is just
20 a much greater wealth of information about users
21 available.

22 And the logic, the algorithms, that are behind
23 making those decisions about what ad I should show a
24 user, that's gotten better over time as the programs
25 have written more of it and refined it and gotten better

30

32

1 **right? If you are going to target ads to a user, you
2 have to configure the business logic on the server, you
3 have to decide what ads you want serve up to which
4 users. There is more than just sending an e-mail;
5 right?**

6 A. That would be true.

7 **Q. And you have never done any of that.**

8 A. Not directly, no.

9 **Q. Okay. And you were at Art.com from 1998 to
10 1999. Is it safe to say that the on-line advertising
11 market has changed significantly from 1999?**

12 A. The technology -- the core technologies have
13 changed. I think the mission is the same.

14 **Q. That's fair. So the mission of displaying ads
15 hasn't changed.**

16 A. Targeting them to users based on where they have
17 been and what they are interested in.

18 **Q. But the technology and sophistication of
19 targeting and the means of targeting, those all have
20 dramatically changed, haven't they?**

21 A. I don't know that they have. I can't imagine
22 they would have changed that much, other than just to
23 be -- you know, there is more of it. There is more
24 information now, because they have been collecting data
25 for 10 years, so they certainly -- there is a greater

1 at it so --

2 **Q. So a significant difference in those categories
3 you've just mentioned between 1999 and today, which is
4 2010.**

5 A. Well, even in 1999 if you went to a website and
6 you were looking at a product and you were clicking
7 around and maybe you clicked on a banner ad and you were
8 looking at a product and maybe it was airline tickets or
9 something like that, then the next day you come back and
10 go to look at a different website and all of a sudden
11 you are seeing ads to go to Jamaica, because the day
12 before maybe you were pricing tickets for Jamaica, that
13 would happen in 1999.

14 **Q. To the same extent it happens today?**

15 A. I think it does, yeah. Maybe it happens more
16 now because there is more websites in the networks. So
17 it wouldn't happen as much then because, again, the
18 wealth of information. There weren't as many people in
19 the network then. So if a company like Mediaplex has a
20 network of people using their service, it is much larger
21 now.

22 So the chances that -- when I go and look for --
23 for example, the other day I was looking for a watch. I
24 wanted to buy a new watch and I was pricing watches and
25 pricing watches, and then I went to another website that

33

1 was totally unrelated and I actually saw one of the
2 watches that I was looking at. So I think that's the
3 overall objective, is to do that. I think there is
4 other -- I'm sure there is other angles to how it is --

5 Maybe you have heard the term gorilla marketing.
6 That's really what it is, it is called gorilla
7 marketing, where you are trying to get people interested
8 in something by throwing ads at them when they don't
9 expect it. And that hasn't changed. It has just gotten
10 worse. I don't mean to say worse. It has gotten more
11 prevalent, is the word that I should use.

12 **Q. Let me ask one wrap-up question on this and**
13 **we'll move on, because we are spending a lot of time on**
14 **it.**

15 **Do you think the options available to users as**
16 **far as targeting were the same in 1999 as they are today**
17 **on the Mediaplex system?**

18 A. I think there is probably more options. Any
19 product grows over time. There is probably more
20 options, better demographics now, because you didn't
21 have the demographics then.

22 **Q. Okay.**

23 A. If that's what you mean. I'm not sure that
24 that's what you mean.

25 **Q. I think that's a fine answer.**

34

1 **Let's move on to Microsoft Windows. Are you an**
2 **expert in the functioning of Microsoft Windows?**

3 A. That's a broad question. Microsoft Windows is a
4 massive application. Nobody is an expert in every
5 single portion of it at any given time, but the -- I
6 think the ability to go in and figure out what's going
7 on in Microsoft in a certain part of the application,
8 that ability is more what makes somebody an expert than
9 just knowing how the entire application works.

10 Because nobody knows how the entire application
11 works. Nobody's an expert in the entire suite of tools
12 that is Microsoft Windows, because it is almost like a
13 conglomerate of lots of different software; Internet
14 Explorer, which originally was Mosaic. That was brought
15 into the fold. There has been -- you know, like
16 processmon, for example, perfmon, all of these different
17 things that you see, many of them were originally a
18 software company in and of themselves. They were
19 purchased by Microsoft, and the technology was licensed
20 so there is teams of people that work on all of these
21 different components. I'm familiar with most of the
22 components in Windows and how they work.

23 **Q. And does that apply across all versions of**
24 **Windows or is your expertise specific to some versions**
25 **and not others?**

35

1 A. I would say that my experience with Microsoft
2 really started with I want to say Windows 3.2 back when
3 there was INI files that ran everything and there was no
4 registry at all.

5 **Q. I remember it well.**

6 A. And then they packed the INI into the registry,
7 I think in Windows 95. Yeah, I would say that I have
8 been with the software since the beginning, and i
9 actually worked on the team that -- I worked as a beta
10 tester when I was in college for NCSA for a software
11 product called Mosaic and I had no idea what I was
12 looking at.

13 So it is just amazing to think back, that I was
14 sitting there in a room with Marc Andreessen while he
15 invented the Internet.

16 **Q. So Windows 3.2, Windows 95 -- there have been so**
17 **many versions -- XP?**

18 A. Windows 98, Windows Millennium, Windows XP, SP1,
19 SP2, Windows Vista. I don't really want to talk about
20 Windows Vista.

21 **Q. And Windows 7 as well?**

22 A. Windows 7. I have Windows in 64 bit versions as
23 well.

24 **Q. If you are like most computers guys I know, you**
25 **have multiple computers. Would that be a correct guess?**

36

1 A. That would be a correct guess, yes.

2 **Q. On which operating systems do your various**
3 **computers run?**

4 A. I have Windows XP on a laptop. I have
5 Windows 7, 32-bit edition, and Windows 7, 64-bit
6 edition, and I also have a Windows 98 machine.

7 **Q. Are these all different computers? I should**
8 **have been clearer. Why don't we list the computer and**
9 **the operating system, and if there is more than one**
10 **operating system per computer, just let me know.**

11 A. The only one that has more than one operating
12 system is the Windows 7 machine.

13 **Q. So let's just start. You have a laptop and**
14 **that's running what?**

15 A. Windows 7, 32 bit, and Windows 7, 64 bit dual
16 boot.

17 **Q. And what's the second computer?**

18 A. My wife's computer, which used to be mine, is an
19 XP machine.

20 **Q. Is that a laptop or desktop?**

21 A. That's a laptop.

22 **Q. And that's a window what machine?**

23 A. That's Windows XP.

24 **Q. XP --**

25 A. I believe it is -- yeah, I believe it is SP2.

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39

1 **Q. So Windows XP, SP2. Next computer?**
 2 A. Windows 98, and I couldn't tell you which
 3 version of Windows 98 it is.
 4 **Q. Is that a desktop or laptop?**
 5 A. Laptop.
 6 **Q. And that's running Windows 98. And next**
 7 **computer, if there is one?**
 8 A. That's the only ones that are running.
 9 **Q. Okay. So three laptops that you are --**
 10 A. I have a server too but it is not running, and I
 11 think it has Server 2000 on it.
 12 **Q. Okay. And any computers that you have recently**
 13 **retired? And I will refined recently as 2004 or**
 14 **forward.**
 15 A. I don't know. I don't think they would still
 16 exist. I had a laptop that the hard drive blew on it
 17 and it was Windows Vista and I didn't keep -- that would
 18 be the only one that's retired, and I have a Windows --
 19 and I have a Windows 7, 32-bit laptop that the hard
 20 drive got -- it is egg-scrambled too. I'm not always
 21 the nicest person to my own computers.
 22 **Q. So two computers on the scrap heap, fair to say,**
 23 **and then three that are in circulation?**
 24 A. Yeah. The Windows 98 one, that one will boot
 25 up. That's all I can say about that. My son uses it.

1 A. I'm not really not sure -- that's my day job. I
 2 don't do any work related to this there. I'm not sure
 3 that's appropriate for me to talk about, you know, what
 4 might be a kCura proprietary --
 5 **Q. I don't think the operating system on your kCura**
 6 **computer would be proprietary. I promise that I won't**
 7 **ask you anything about what's contained on the computer.**
 8 **I just need to know what operating system it is.**
 9 A. Windows -- I believe it is Windows 7, 32 bit.
 10 And the reason I'm not that familiar with it is because
 11 I'm not on it that often. I'm usually at a VM, and my
 12 VM is Windows 7, 64 bit.
 13 **Q. Now, explain to me how you are in a VM machine**
 14 **at work. Do you operate that off of your work computer?**
 15 A. No. The VM sits on a -- I wish I could tell you
 16 the exact machine, but it sits on a VM -- what we call a
 17 VM host, which is a very massive computer that has lots
 18 of CPUs, lots of RAM, and it gets chopped up, and its
 19 sole purpose in life is to present VMs to developers and
 20 service specialists.
 21 **Q. And is that VM server owned by kCura or someone**
 22 **in the --**
 23 A. Yes, it is owned by kCura.
 24 **Q. So you -- you go to work, you turn on your**
 25 **Windows 7 desktop, and then you access the VM server**

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1 It has Photo Shop 3.0 on it, and he plays around in
 2 there and he is eight and he likes to draw pictures and
 3 he hasn't done that for a while.
 4 **Q. So kind of a utility laptop, but the Windows 7,**
 5 **32 bit and 64 bit, that's your main computer.**
 6 A. Yeah.
 7 **Q. Your wife is the one that use the XP computer.**
 8 A. Yeah. And at work I use -- but that's my
 9 day job.
 10 **Q. Let's talk about that as well. You work, as I**
 11 **understand it, at a software provider, is that accurate?**
 12 A. Software company.
 13 **Q. Software company. It is kCura?**
 14 A. Yeah, k-C-u-r-a.
 15 **Q. And when you -- do you go to work every day,**
 16 **like Colleen and I do, or are you a consultant that**
 17 **works --**
 18 A. I go to work every day. I'm an employee there.
 19 **Q. Okay. So you report to the office and you sit**
 20 **at a desk.**
 21 A. Yes.
 22 **Q. And is there a computer there?**
 23 A. Yes.
 24 **Q. And what kind of computer is that? What**
 25 **operating system?**

1 **through that Windows 7 desktop; do I have that right?**
 2 A. That's right.
 3 **Q. Okay. Why don't we at this point go through**
 4 **your employment history, and this may be easier if you**
 5 **have your report in front of you.**
 6 MR. ARENSON: Why don't we introduce your report
 7 as Exhibit 1.
 8 (Ellis Exhibit Number 1, Ellis Report, was
 9 marked for identification.)
 10 BY MR. ARENSON:
 11 **Q. Take a quick look at that and just verify that**
 12 **that is the report that you submitted in this case.**
 13 A. It looks like it. It has got my signature.
 14 **Q. Okay. So I want to talk about the jobs that you**
 15 **have held that are relevant to the opinions in this**
 16 **report, so you don't need to tell me about every job you**
 17 **have ever had but jobs that you have held that gave you**
 18 **experience that you drew on to put together this report.**
 19 A. Okay.
 20 **Q. Why don't we start with the furthest one back**
 21 **and we'll work forward. And if you can give me a page,**
 22 **that would be helpful.**
 23 A. 27, I think we are on here, 28. We are starting
 24 with back in time?
 25 **Q. Whatever the first job was that you held that**

<p style="text-align: right;">41</p> <p>1 you developed experience relevant to your report. If</p> <p>2 you look at 27, you can find a listing of the jobs. Is</p> <p>3 that helpful?</p> <p>4 A. Yeah. Thank you.</p> <p>5 Q. No problem.</p> <p>6 A. Well, I mean, I began working in computers in</p> <p>7 1986 and 1987. I worked in the missile facilities data</p> <p>8 center.</p> <p>9 Q. Did you draw on that experience in preparing</p> <p>10 your report?</p> <p>11 A. I think I draw on my life experience when I do</p> <p>12 anything and -- technical or analysis-wise, and that was</p> <p>13 really where I began to lay the groundwork for knowledge</p> <p>14 about distributed systems.</p> <p>15 Q. Okay.</p> <p>16 A. You know, we had a number of missile --</p> <p>17 intercontinental ballistic missile sites.</p> <p>18 Q. Sounds scary.</p> <p>19 A. They were nuclear in nature.</p> <p>20 Q. You can tell me about this stuff but you can't</p> <p>21 tell me about kCura Corporation?</p> <p>22 A. Well, I think that's all been declassified now.</p> <p>23 There are things I can't tell you, that I don't think</p> <p>24 there are declassified yet.</p> <p>25 Q. Okay. I understand. So what did you do while</p>	<p style="text-align: right;">43</p> <p>1 I started to work as an assistant, he asked me, he said,</p> <p>2 hey, everybody's getting a website. I want a website</p> <p>3 for my research group. Can you build a website? And I</p> <p>4 said, sure, I can build a website. I have done that</p> <p>5 before. Because when I was working as a student at</p> <p>6 another college, I had gotten a lot of -- when I began</p> <p>7 my experience working with Mosaic -- and you might</p> <p>8 remember a piece of software called Lynx, which was like</p> <p>9 a text version of the Internet? I think it was spelled</p> <p>10 L-y-n-x. This was one of the early -- I'm dating</p> <p>11 myself, but -- so I had experience developing websites,</p> <p>12 you know, building websites for fun, right.</p> <p>13 Q. Writing HTML code?</p> <p>14 A. Yeah. I probably wrote my first line of HTML</p> <p>15 code in 1993, I would guess, '94. Yeah, I can't put a</p> <p>16 specific date on when I did the work with Mosaic but it</p> <p>17 was around that time frame, '92, '93, around there.</p> <p>18 Q. Okay.</p> <p>19 A. And that was what got me -- you know, it was --</p> <p>20 everybody was really excited about the Internet back</p> <p>21 then so everybody was writing web pages. And when I</p> <p>22 came to work as a research assistant there, I built</p> <p>23 their website, and then I built a website for a couple</p> <p>24 other people, and then I built lots of websites. And</p> <p>25 then I worked for a company that that's all we did was</p>
<p style="text-align: right;">42</p> <p>1 you were working in these nuclear missile facilities?</p> <p>2 A. I would develop reports and print reports and</p> <p>3 fix printers and, you know, analyze soft- -- like when I</p> <p>4 first started working there, they had a -- this is</p> <p>5 like -- you remember those green terminals with the</p> <p>6 green screens and they had the little function buttons</p> <p>7 on the bottom and you would click the function button to</p> <p>8 get into the application.</p> <p>9 We had no manuals that explained how any of this</p> <p>10 stuff worked, and that was one of the first things I had</p> <p>11 to do was write a manual for the software. That was</p> <p>12 like the beginning of my software analysis, was like,</p> <p>13 okay, how does that work, what does this do, find out,</p> <p>14 and write the manual for it.</p> <p>15 And that would -- that's just the start, right?</p> <p>16 How is it relevant? Is there a specific thing that I</p> <p>17 did at that job that's relevant to this? Other than</p> <p>18 just adding to my experience, no, there is no one thing</p> <p>19 I can say was like, wow, I learned this here and it is</p> <p>20 applicable here.</p> <p>21 Q. Okay. That's fair. So let's move on to the</p> <p>22 next job that is relevant to this report.</p> <p>23 A. Well, I worked as a -- as a research assistant</p> <p>24 at the University of Illinois Chicago is when I really</p> <p>25 began to get into web design. The professor there, when</p>	<p style="text-align: right;">44</p> <p>1 build websites for on-line magazines.</p> <p>2 Q. Which company is that?</p> <p>3 A. That would be H & S Media.</p> <p>4 Q. Okay. And --</p> <p>5 A. I apologize. This is not nearly as complete as</p> <p>6 it should be. This was the resume that I listed when I</p> <p>7 worked for another company, and this is -- yeah.</p> <p>8 Q. So there is some jobs that aren't included in</p> <p>9 here. One of them is H & S Media?</p> <p>10 A. Yeah.</p> <p>11 Q. And what did you do at H & S Media? Actually,</p> <p>12 before I ask that, is that before or after University of</p> <p>13 Illinois at Chicago?</p> <p>14 A. That was after.</p> <p>15 Q. Okay.</p> <p>16 A. No. It would be -- when did I work there. It</p> <p>17 was right before Art.com and I started working at</p> <p>18 Art.com in '98, so it was just five months that I worked</p> <p>19 there.</p> <p>20 Q. Okay. So let's sum up. University of</p> <p>21 Illinois --</p> <p>22 A. I'm sorry. I wanted to finish answering your</p> <p>23 question.</p> <p>24 Q. Sure. Go ahead.</p> <p>25 A. I was the webmaster. That was my official</p>

<p style="text-align: right;">45</p> <p>1 title, was webmaster. 2 Q. At H & S? 3 A. Yes. At H & S Media. 4 Q. All right. 5 A. And you may have heard of such publications as 6 Mary Beth's Beanie Baby Monthly Magazine? 7 Q. Personally haven't, although I remember Beanie 8 Babies very well. 9 A. They published that magazine and they had an 10 on-line site. 11 Q. Sounds like very exciting times. 12 A. It was a wild time. 13 Q. So at the University of Illinois at Chicago you 14 were the guy designing web pages; is that a fair 15 assessment? 16 A. For my research group, yeah. 17 Q. Anything else you did at the University of 18 Illinois Chicago? 19 A. Yeah. We developed an application that was 20 based in C++ that was designed to be available via the 21 web that would allow people to submit a crystal 22 structure based on data collected from electron 23 microscopes to analyze grain boundaries in the 24 substrates of -- 25 Q. It is okay. Probably doesn't matter.</p>	<p style="text-align: right;">47</p> <p>1 Q. Got you. So from your student days at 2 University of Illinois, you went onto H & S, and that's 3 when you did the Beanie Baby monthly work. 4 A. Yeah. It was an on-line -- we would do on-line 5 contests. I wrote some code to do a -- to pick a random 6 winner for a contest from a list of contestants. People 7 would enter into the contests and get a free Beanie. I 8 did some graphics work, not a lot. My coworkers would 9 design most of the graphics, but I would do some touchup 10 work and resizing of images, things like that. 11 Q. What kind of code were you writing at the time? 12 A. That was written in -- it was a CGI script, and 13 I believe I -- I believe that was in C++. It was common 14 gateway interface. Back then CGI was the way that you 15 would interface with the users. You would pass 16 variables into a -- basically a CGI executable that 17 would be running on the computer that would be able to 18 process it. ASP was a baby at that time. CGI was a 19 more mature programming language. 20 Q. Okay. And then anything else that we should 21 talk about at your time at H & S that's relevant to what 22 you wrote in your report? 23 A. Not that I can think of. 24 Q. Okay. 25 A. That was a long time ago. There was a lot of</p>
<p style="text-align: right;">46</p> <p>1 A. Solid state materials. 2 Q. Okay. So is it fair to say you were doing 3 coding while you were there? 4 A. Yes. 5 Q. You were writing HTML. You were writing code 6 for C++. Was that your primary function at University 7 of Illinois Chicago? 8 A. I was a student. That was my primary function. 9 I was a student. I was studying physics there. 10 Q. Okay. So that's new information. 11 A. I was an undergrad. 12 Q. So you were studying and you held -- were these 13 paid positions? 14 A. Yes, this was a paid position. I had my own 15 cubicle and computer and everything. 16 Q. So you were a student at University of Illinois, 17 and at the same time on the side you are doing some 18 programming for some extra cash? 19 A. I was doing this for that group and I was doing 20 it on the side for extra cash. My roommate had worked 21 at a company and I was telling my roommate about, you 22 know, that I'm building a website and he said my boss 23 wants a website. And then it kind of snowballed from 24 there, and then I ended up getting a job with Mary 25 Beth's Beanie World Monthly.</p>	<p style="text-align: right;">48</p> <p>1 marketing that went on -- we had affiliates as well, 2 people that we were having -- we were placing banner ads 3 with people that we knew were -- this sounds ridiculous, 4 but we knew that there were some people that were 5 considered experts and they had websites, and they would 6 get hits on their websites, and we would be like, hey, 7 put our banner ad, and we would pay them to put our 8 banner ad on their website. 9 Q. Now, were you directly placing those banner ads 10 or was that something the company was doing? 11 A. That would have been me directly sending 12 somebody a banner ad to do. 13 Q. So this was a one-to-one transaction. 14 A. Yeah. 15 Q. You would contact these website owners and say 16 we have an ad we would like you to run and we'll pay 17 for it. 18 A. I didn't say that we would pay for it, but I was 19 involved in that conversation and I would be the one 20 that would work with the person to make sure that it got 21 posted correctly, and if there was a new ad, they 22 would -- I apologize about that. I completely forgot 23 about that. I have had a lot of experience. 24 Q. That's fine. There was no third-party ad 25 network involved in that transaction though.</p>

<p>49</p> <p>1 A. Not to my knowledge.</p> <p>2 Q. So from H & S you moved on to Art.com.</p> <p>3 A. I did.</p> <p>4 Q. And that was in 1998. What did you do at</p> <p>5 Art.com?</p> <p>6 A. I was a project manager there.</p> <p>7 Q. What does that entail?</p> <p>8 A. That entailed -- we had a website called</p> <p>9 Art.com, and we also had a website called</p> <p>10 Artprintindex.com, and I would work to establish</p> <p>11 projects, technical projects of a technical nature, and</p> <p>12 then I would work with developers to make sure they got</p> <p>13 executed in a timely fashion.</p> <p>14 Most of my time would be spent doing that, and I</p> <p>15 would work with -- we had contractors that worked with</p> <p>16 us. I can't remember the names of the companies. They</p> <p>17 would be working on projects to develop additional code.</p> <p>18 I worked on the payment system. I worked heavily on the</p> <p>19 financial -- the back-end system. Warehouse projects</p> <p>20 would be mine, anything that involved -- one time we had</p> <p>21 a problem where we had a large amount of money in our AR</p> <p>22 that had to be -- we had to figure out where it was</p> <p>23 coming from, and I did provide a data analysis for that.</p> <p>24 I had done a lot of data analysis as physics student in</p> <p>25 research; you know, handling large sets of data,</p>	<p>51</p> <p>1 our website works and how we are driving traffic in. I</p> <p>2 can't remember the specific projects.</p> <p>3 Q. That's fine.</p> <p>4 A. There were a lot.</p> <p>5 Q. Are there specific experiences you had at</p> <p>6 Art.com that you drew on in preparing your report?</p> <p>7 A. That was where I really learned about the whole</p> <p>8 affiliate marketing. How an affiliate marketing program</p> <p>9 works.</p> <p>10 Q. Now, what was your interaction with the</p> <p>11 affiliate -- the affiliates, I guess, or the affiliate</p> <p>12 marketers? What was your job?</p> <p>13 A. What was my job? Specifically if we needed to</p> <p>14 modify code or change the way things worked to</p> <p>15 accommodate the affiliate marketers, that would be a</p> <p>16 project that would have fallen under my belt that I</p> <p>17 would have had to work on.</p> <p>18 Q. Can you explain to me what role the affiliates</p> <p>19 played with Art.com?</p> <p>20 A. They drove traffic to the site.</p> <p>21 Q. How would they do that?</p> <p>22 A. They would post banner ads on their sites. You</p> <p>23 know, an affiliate might have 20 websites that they</p> <p>24 manage.</p> <p>25 Q. So strictly banner ads or were there anything</p>
<p>50</p> <p>1 filtering data out, parsing data. That was what I was</p> <p>2 good at doing also.</p> <p>3 Q. Are you writing code at this point or is this</p> <p>4 more of a different type of experience?</p> <p>5 A. I was writing some HTML code, like somebody</p> <p>6 would say how do I do this and it would be like -- I</p> <p>7 would explain to them -- I would work directly with the</p> <p>8 developers and say why don't you do it this way.</p> <p>9 We had a problem where people were complaining</p> <p>10 about, you know, our members were artists, right, and</p> <p>11 they would say, hey, I was on Art.com and I downloaded</p> <p>12 this image and, yeah, it is only 120 by 200 pixels big</p> <p>13 but it says it is 300 DPI and I'm concerned people could</p> <p>14 print this out and it would be art quality.</p> <p>15 It would be the size of a thumbnail if they did,</p> <p>16 but to satisfy them I developed a method and a script</p> <p>17 that went through and changed all of them to say 72 DPI.</p> <p>18 That's just exif, e-x-i-f, data.</p> <p>19 Q. So a little bit of code writing but more of a</p> <p>20 data analysis role. What else did you do?</p> <p>21 A. That was it.</p> <p>22 Q. Okay. So --</p> <p>23 A. Project management, work with people, coding,</p> <p>24 work with the affiliate manager on his projects, help</p> <p>25 him, you know, put things together, understand like how</p>	<p>52</p> <p>1 else?</p> <p>2 A. Banner ads. They wouldn't place orders for us.</p> <p>3 We also had the art print index but I think that's a</p> <p>4 different animal. That was a standalone software</p> <p>5 application in a catalog that we would mail out.</p> <p>6 Q. Let me make sure I have this right. The</p> <p>7 affiliates would have their own websites. You would</p> <p>8 give them banner ads to display on these websites, which</p> <p>9 would in turn drive traffic back to Art.com and</p> <p>10 presumably buyers.</p> <p>11 A. Right. And they were also working with -- I</p> <p>12 want to say somebody like a Mediaplex. It might have</p> <p>13 been Mediaplex. I don't remember who it was.</p> <p>14 I know that there was a couple of big names,</p> <p>15 like companies that had the ability to target ads on</p> <p>16 lots of different sites, so those would also be part</p> <p>17 of that.</p> <p>18 Q. Okay. Now, you left Art.com in 2000? Do I have</p> <p>19 that right?</p> <p>20 A. Yeah. I think it was early 2000, maybe late '99</p> <p>21 or earlier 2000.</p> <p>22 Q. You can look right there. It is not a guessing</p> <p>23 game. You said 2000. Do you think that was right?</p> <p>24 A. I don't see Art.com. Am I looking at the right</p> <p>25 page?</p>

<p>53</p> <p>1 Q. 27, professional history.</p> <p>2 A. Oh, thank you. Yeah, that's -- yeah, that was</p> <p>3 late 2000.</p> <p>4 Q. Okay. After you left Art.com, did you have</p> <p>5 further involvement with affiliates in your future jobs?</p> <p>6 A. No.</p> <p>7 Q. Okay. Is it safe to say that the --</p> <p>8 A. Maybe at Chemistri, at Leo Burnett. I'm sure</p> <p>9 that, you know --</p> <p>10 Q. You don't know.</p> <p>11 A. I can't recall. I don't recall. It is a</p> <p>12 very -- it was more than 10 -- it was almost 10 years</p> <p>13 ago.</p> <p>14 Q. So no specific recollection of working with</p> <p>15 affiliates at Chemistri.</p> <p>16 A. No.</p> <p>17 Q. Is it safe to say that the affiliate -- is it</p> <p>18 safe to say that affiliate marketing programs have</p> <p>19 changed significantly since the year 2000?</p> <p>20 A. I think we already had this discussion.</p> <p>21 Q. Nope. This one I'm sure about. We haven't had</p> <p>22 the discussion about affiliates.</p> <p>23 A. About whether or not it has changed</p> <p>24 significantly? I think the individual sole proprietor,</p> <p>25 the person that can say, hey -- I think that's probably</p>	<p>55</p> <p>1 Q. Maybe we need to define what you mean by</p> <p>2 affiliate. I'm not sure we mean the same thing. What</p> <p>3 do you mean when you say "affiliate"?</p> <p>4 A. Somebody who is an affiliate is somebody that</p> <p>5 you are affiliated with.</p> <p>6 Q. I guess that's fair. But not using the word in</p> <p>7 the definition, what do you mean by "affiliate"?</p> <p>8 A. For example, you would have a person that runs</p> <p>9 some websites, and if they are an affiliate, then they</p> <p>10 would be producing and providing and serving up banner</p> <p>11 ads or advertisements for you, and then you would pay</p> <p>12 them based on what's coming through.</p> <p>13 And that's really -- I don't think that's</p> <p>14 changed. I think it is just there is people that are --</p> <p>15 grouped all of those people together, and then they</p> <p>16 can -- and then all of those people are working with</p> <p>17 just one big company, like Doubleclick or something like</p> <p>18 that.</p> <p>19 Q. Okay. So is Mediaplex an affiliate?</p> <p>20 A. I don't think that the company is an affiliate</p> <p>21 in and of itself, but they drive -- that's how they are</p> <p>22 driven. I don't -- I'm not an expert on the corporate</p> <p>23 structure of Mediaplex.</p> <p>24 Q. I'm not asking you if --</p> <p>25 A. I was --</p>
<p>54</p> <p>1 not as prevalent as it was back then. The bigger</p> <p>2 companies have edged out the smaller companies. They</p> <p>3 have bought them up.</p> <p>4 Certainly I know of -- I remember there was one</p> <p>5 called -- I think it was called -- I want to say Lincton</p> <p>6 but I know that's not right. There was a company that</p> <p>7 was doing -- like you could get -- they would send you</p> <p>8 links and stuff and I know they got bought out by one of</p> <p>9 the bigger guys. So there was a lot of that going on</p> <p>10 back then. The landscape is different with respect to</p> <p>11 the size.</p> <p>12 Q. The players are different.</p> <p>13 A. Yeah. You know, yes.</p> <p>14 Q. Okay.</p> <p>15 A. They are bigger. Obviously the players are</p> <p>16 bigger.</p> <p>17 Q. And different. They are not the same players</p> <p>18 you dealt with that have grown bigger, are they?</p> <p>19 A. I don't know. Like I said, I couldn't remember</p> <p>20 the names of the companies that I worked with at</p> <p>21 Art.com.</p> <p>22 Q. Do you know who the top five affiliate networks</p> <p>23 are now?</p> <p>24 A. Yeah. There is Mediaplex, Doubleclick. I can't</p> <p>25 think of --</p>	<p>56</p> <p>1 Q. Hold on.</p> <p>2 A. -- under the impression that we would be talking</p> <p>3 about my report and the specific software today, and so</p> <p>4 I didn't do any research on like how these companies are</p> <p>5 actually interacting with their affiliates. Whether or</p> <p>6 not they are an actual affiliate and they own many, many</p> <p>7 websites, and people just visit those websites, maybe</p> <p>8 they -- you know, I don't know who owns Yahoo.com</p> <p>9 anymore, Yahoo.com would be a company that would work</p> <p>10 with an affiliate, a company that has these</p> <p>11 relationships with big corporate companies, to get these</p> <p>12 banner ads onto their sites.</p> <p>13 Q. Okay. But I guess my question to you was is</p> <p>14 Mediaplex an affiliate? And your answer is --</p> <p>15 A. It is not a yes or no question. My answer would</p> <p>16 be I don't know.</p> <p>17 Q. Okay. Because you are not an expert at the</p> <p>18 affiliate marketplace.</p> <p>19 A. I'm not an expert on Mediaplex.</p> <p>20 Q. Are you currently an expert on the affiliate</p> <p>21 marketplace?</p> <p>22 A. What I said is I'm an expert on how the</p> <p>23 underlying technology works, and I can look at the</p> <p>24 relationships and see how they work and understand them.</p> <p>25 I'm capable of doing that.</p>

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1 **Q. I have no doubt that that is the case. I think**
2 **you have said that three times now. My question is more**
3 **specific to the affiliates and the affiliate**
4 **marketplace.**

5 **Do you claim expertise in the affiliate**
6 **marketplace? How affiliates receive assignments and how**
7 **affiliates carry out assignments, that type of activity?**
8 **Not the underlying code of the Internet, which I**
9 **understand you have a significant amount of expertise**
10 **in. The actual day-to-day interaction with affiliate**
11 **networks, are you an expert in that area?**

12 A. I would say on the business side, no.

13 **Q. Okay. And just so I'm understanding what that**
14 **clarification means. What you mean by "on the business**
15 **side, no"?**

16 A. Like how they are networked together, how these
17 companies -- how they talk to each other, how they
18 establish their relationships. I know the relationships
19 exist. I know that the affiliate marketers, the big
20 companies that are responsible for pushing the ads out
21 to people, I know how they work.

22 I know how that side of things works. I know
23 how it operates. I know how cookies land on your
24 computer. I understand how another website will pick
25 that cookie up and know who you are.

1 reasonable degree of certainty as to how it works
2 because it works like anything else. You call somebody
3 up, you want a service, you order the service, there's
4 options. I did once work with the -- I was actually --
5 probably Google is the biggest advertiser, right, so
6 they are probably the biggest. You know, the Google --
7 I actually have done -- this is great. I'm remembering
8 lots of stuff now. I have worked for the Google ad
9 works campaign. I have directly done that.

10 **Q. Is Google an affiliate?**

11 A. Google has affiliates. Their affiliates would
12 be people that post Google's ads for them. If I'm doing
13 a search on Google and I see -- and you see the banner
14 ads, those are paid for by people.

15 **Q. So you define --**

16 A. I would say that -- yeah, I guess Google would
17 be an affiliate.

18 **Q. An affiliate for who?**

19 A. Of whoever they are putting ads up for. Like if
20 I wanted to put ads onto Google's website, then Google
21 would be my affiliate.

22 **Q. And is Google what's known as an affiliate**
23 **network?**

24 A. It depends on what your definition of affiliate
25 network is. I feel like we are going down a path here,

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1 **Q. And you are getting back into the technical --**

2 A. On the technical side, yes, I'm an expert.

3 **Q. Understood. So you understand the technical**
4 **background of how information is transmitted between**
5 **affiliates, for example, but as far as how affiliate**
6 **networks work on a day-to-day basis, the interactions**
7 **between people, how affiliates sign up with a website,**
8 **and who the biggest affiliates are right now, you don't**
9 **know any of that stuff, do you?**

10 A. No. I don't know who the biggest affiliates are
11 right now, no.

12 **Q. Not just that but the day-to-day interaction**
13 **between affiliates and how affiliates interact on a**
14 **business level with companies, are you an expert in that**
15 **area?**

16 MS. GURLAND: Is there a definition for "on a
17 business level"?

18 MR. ARENSON: He actually used the term, so I'm
19 quoting back a term that he used.

20 A. I'm not sure what you mean.

21 BY MR. ARENSON:

22 **Q. Well, when you told me you weren't an expert on**
23 **the business end, what did you mean when you said that?**

24 A. Oh, I don't know how they are financed. I don't
25 know who calls who. I can -- I can speculate with a

1 and you are trying to get me to say something. I'm
2 really not sure what the objective here is, other than
3 for me to state that I have a very strong understanding
4 of this business.

5 **Q. Which business?**

6 A. Of the business of the Internet. I have a very
7 strong understanding, expert understanding --

8 **Q. But that's a large statement, right? You don't**
9 **have an understanding, or an expert level understanding,**
10 **of all the business on the Internet. That would be**
11 **impossible.**

12 A. I don't think that's true. I think that we are
13 mixing words here.

14 **Q. I'm really not trying to trap you on anything.**
15 **I just need to understand the difference between the**
16 **technical side, which you have explained in significant**
17 **detail that you have expertise in, and the business**
18 **side, which is a word that you gave me.**

19 **The interactions between the parties, the**
20 **individual networks, that side, the affiliate business**
21 **side, the day-to-day activity, do you have expertise in**
22 **that area, technical area aside?**

23 A. I have experience in that area.

24 **Q. Okay.**

25 A. I don't do it every day.

<p>61</p> <p>1 Q. When was the last time you did it?</p> <p>2 A. The last time I submitted like an ad-works</p> <p>3 campaign was probably 2004. I think it was 2004. I'm</p> <p>4 guessing. It was when I was working for Computer Bits.</p> <p>5 2002, 2003 I worked with a Google ad-works campaign.</p> <p>6 Q. Okay. So six years ago. And I don't mean to</p> <p>7 belabor this: Are you an expert in the day-to-day</p> <p>8 business activities of an affiliate network?</p> <p>9 A. I can speak to it. I believe that I have</p> <p>10 sufficient experience in how that sort of thing works to</p> <p>11 provide knowledge that would be like suitable to help</p> <p>12 somebody understand how it works.</p> <p>13 If somebody needed help from me to understand</p> <p>14 how that whole networking side of things works and how</p> <p>15 the information comes down to people's computers and how</p> <p>16 the cookies appear and how banner ads are targeted, I</p> <p>17 can provide that knowledge.</p> <p>18 Q. You define an expert as a go-to person; is that</p> <p>19 right?</p> <p>20 A. Yeah.</p> <p>21 Q. So you are a go-to person on how affiliate</p> <p>22 networks function.</p> <p>23 MS. GURLAND: I think that's not what his</p> <p>24 testimony was.</p> <p>25 MR. ARENSON: Well, I'm asking the question.</p>	<p>63</p> <p>1 you wrote in this report?</p> <p>2 A. Just my experience with working on a big</p> <p>3 campaign and understanding the scope of a campaign.</p> <p>4 Q. Okay.</p> <p>5 A. Not particularly. It wasn't the most --</p> <p>6 Q. Okay. Next job, Computer Bits, tell me a little</p> <p>7 bit about that?</p> <p>8 A. Computer Bits I would provide support for law</p> <p>9 firms. That's where I did a lot of network</p> <p>10 architectural work, did a lot of PC installs, server</p> <p>11 installs, designed and built websites.</p> <p>12 Q. What kind of company is Computer Bits?</p> <p>13 A. It is a privately held small company of about</p> <p>14 eight guys. It is a computer consulting firm. They</p> <p>15 provide everything from network architecture to</p> <p>16 application design, software support.</p> <p>17 Q. And what experience at Computer Bits did you</p> <p>18 rely upon to draft your report?</p> <p>19 A. I wrote a lot of code when I worked for Computer</p> <p>20 Bits. I wrote a lot of code and I got into forensics</p> <p>21 there. That's where I began to do forensic work.</p> <p>22 Q. Okay. What kind of code --</p> <p>23 A. That's where I went to a class on forensics. I</p> <p>24 got certified in forensics when I worked there. I wrote</p> <p>25 ASP using VB script, wrote with sequel server, wrote</p>
<p>62</p> <p>1 BY MR. ARENSON:</p> <p>2 Q. Are you a go-to person on how affiliate networks</p> <p>3 function?</p> <p>4 A. I would be -- I would not say that that's my</p> <p>5 role every day.</p> <p>6 Q. In fact --</p> <p>7 A. But in the experience of doing my work in the</p> <p>8 forensic side of things, can I speak to it? Yes, I can.</p> <p>9 Q. Okay. Let's move forward.</p> <p>10 Let's actually dive into the next job -- I guess</p> <p>11 we didn't talk about Chemistri and Leo Burnett. What</p> <p>12 did you do there?</p> <p>13 A. We did talk about that.</p> <p>14 Q. Remind me.</p> <p>15 A. I was the web producer. We talked about this.</p> <p>16 Q. I don't remember. Help me out. What kind of</p> <p>17 web producing did do you at Chemistri?</p> <p>18 A. It was the -- it was the Army campaign, Go Army,</p> <p>19 Army of One.</p> <p>20 Q. Was that all you worked on?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And that was the sum total of your</p> <p>23 experience at Chemistri; is that correct?</p> <p>24 A. Yes.</p> <p>25 Q. And is any of that experience relevant to what</p>	<p>64</p> <p>1 sequel queries, worked with Cold Fusion, wrote a cold</p> <p>2 fusion application for the Illinois comptrollers office</p> <p>3 that would handle scheduling and -- for the comptroller.</p> <p>4 Q. I don't need to know about every piece of code</p> <p>5 you wrote. I think I have a general sense of what you</p> <p>6 did there.</p> <p>7 How did you use that experience in writing this</p> <p>8 report?</p> <p>9 A. Well, it's my forensic experience and my</p> <p>10 experience with security and with the popups that we</p> <p>11 talked about, with analysis of what software was doing,</p> <p>12 going into log files, examining log files, examining IAS</p> <p>13 log files. All this work that I did, you know, using</p> <p>14 processmon to figure out what was going on on a computer</p> <p>15 when something was happening, analyzing software.</p> <p>16 Q. Okay.</p> <p>17 A. Working on performance issues, dealing with</p> <p>18 companies like setting up spam filters, setting up popup</p> <p>19 blockers, all that work, that was what I did there day</p> <p>20 in and day out.</p> <p>21 Q. Okay.</p> <p>22 A. Something night in and night out too and on the</p> <p>23 weekends.</p> <p>24 Q. I believe it. Next job, RGL. What kind of</p> <p>25 company is RGL.</p>

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1 A. RGL is a forensic consulting firm.
2 **Q. All right. What did you do there?**
3 A. I was a manager of the forensic and litigation
4 technologies practice.
5 **Q. Okay. And what did that entail?**
6 A. That entailed handling forensic engagements
7 where there would be a -- for example, there would be a
8 company called -- like patent infringement case or a TRO
9 going on, imaging computers and doing the analysis,
10 doing analysis of financial systems, pulling data out.
11 More of the same type of stuff that I had been doing for
12 the last few years but more focused on doing it like for
13 preparation for a court case.
14 **Q. And how did you draw on that experience in**
15 **writing your report?**
16 A. Report writing, understanding what I -- being
17 focused on what I need to do. You know, I certainly
18 took more classes on forensics when I worked there so
19 the forensic side of things. Understanding how a
20 forensic case is built and what you need, what are the
21 requirements to be able to say that something is
22 forensic; learning about chain of custody and
23 establishing chain of custody, and working with
24 attorneys to ensure that checks and balances were in
25 place to protect data.

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1 **Q. Okay.**
2 A. All of those things were excellent background
3 for doing this kind of work.
4 **Q. Okay. Anything else?**
5 A. In fact, I was there when this engagement began.
6 **Q. Okay. So you started writing this report while**
7 **you were at RGL and you subsequently moved over**
8 **to kCura?**
9 A. Yes.
10 **Q. All right. Have we covered everything -- the**
11 **experience that you drew on to write your report at RGL?**
12 A. Probably not everything. That would certainly
13 be a topic for an entire day, all the experiences that I
14 had there that gave me the experience to be good at
15 what I do.
16 **Q. Have we given a fair overview of --**
17 A. I think we have given it a fair overview.
18 **Q. You moved to kCura Corporation in 2009. Has**
19 **there been experience that you gained at kCura**
20 **Corporation that you applied in writing this report?**
21 A. Yes. I'm elbows deep in servers all day long
22 every day understanding how a very complex application
23 works, running things like perfmon, processmon, writing
24 reports, examining software behavior, looking for the
25 unexpected, uncovering -- working with the Windows

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1 registry.
2 **Q. Okay.**
3 A. Working with HTTP, protocols, mapping out
4 protocols.
5 **Q. Okay.**
6 A. I mean, the software is called Relativity.
7 That's the name of the software tool that we provide,
8 and it is a -- it is an enterprise class application and
9 it involves users going to a web browser and downloading
10 like an active-x object and installing it and reviewing
11 documents. And lots of times there can be conflicts,
12 right?
13 Because there is so many different Windows
14 systems out there and so many softwares that they have,
15 things get into the registry that shouldn't be there.
16 They need to be removed so our software will work. Not all
17 software plays nice in the registry.
18 **Q. Okay. Any other overview topics you want to**
19 **talk about that you applied to your report from your**
20 **time at kCura?**
21 A. I think that I have covered the high levels
22 of -- I certainly don't want to say that, you know,
23 there is something -- that we have covered everything in
24 my experience that could have been used in this report.
25 **Q. Okay.**

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1 A. I can certainly rely back to my memory and think
2 back to things that -- if I were to read through my
3 report, I could very likely think of examples from
4 different jobs of what was -- you know, how did I learn
5 how to do that, and there was probably new things that I
6 decided to do with this that I hadn't done before. It
7 was an art.
8 **Q. Can you give me some examples of new things that**
9 **you decided to do with this report that you hadn't done**
10 **before?**
11 A. Well, I think that loading something onto an
12 older version of software and throwing it into a VM and
13 doing that, that's not something that I would normally
14 do in my daily practice, but it is something that I --
15 it is something that I do.
16 We have VMs in my practice. We do use virtual
17 machines to load software onto it. We just use current
18 versions of software, but to try to go back in time like
19 that, it was --
20 **Q. Okay. Any other examples?**
21 A. No. That's it.
22 **Q. Okay. And then Scott R. Ellis Consulting, is**
23 **this a company you set up for the purposes of this case**
24 **or did that company do other work?**
25 A. I do other work for law firms. I have other

<p style="text-align: right;">69</p> <p>1 cases. When I left RGL, I had a number of engagements 2 that I took with me that I continued to work on. 3 Q. Did Scott R. Ellis Consulting exist before you 4 were retained in this case or after? 5 A. It existed prior to that. I have been doing -- 6 I have been doing work under my own name for a long 7 time. 8 Q. Okay. So prior to the engagement for this. 9 A. Yeah. Scott R. Ellis Consulting is in existence 10 as a corporation. I'm a single person so I do business 11 in Illinois. I'm registered in Illinois, I believe. 12 I'm not sure how that works. Somebody did that for me. 13 Q. What kind of work do you do at Scott R. Ellis 14 Consulting? 15 A. Forensics. 16 Q. Solely forensics? 17 A. I do some web design, website support, as well. 18 I do some training, although I haven't done training in 19 a while. It has been a few years. 20 Q. What kind of website design do you do? 21 A. It is a website like HTML graphic design-type 22 stuff. 23 Q. Are you writing code for websites? 24 A. Yeah, sure. Cold Fusion, in fact. I still 25 write Cold Fusion code.</p>	<p style="text-align: right;">71</p> <p>1 BY MR. ARENSON: 2 Q. Mr. Ellis, we were talking at the break about -- 3 just rapping through your employment history. One 4 follow-up questions about the training you said you had 5 done as part of Scott R. Ellis Consulting -- 6 A. Yes. 7 Q. -- what kind of training was that? 8 A. I gave training on the use of a software 9 application to the -- to FHA. 10 Q. Which software application? 11 A. It is called Right Now. It was a customer 12 support portal, and I worked with the vendor to develop 13 training materials, and then I delivered that training 14 in Denver and in California, southern California, like 15 San Jose, La Joya maybe, and then I also did -- and that 16 was for FHA, and then I also did a training program for 17 the U.S. Department of Commerce. 18 Q. And what was that about? 19 A. That was about, you know, Internet -- 20 establishing an Internet business and running an 21 Internet business and the different -- you know, how to 22 market yourself with a website, and that involved -- 23 also that was a joint training session that I did with a 24 guy named Larry Tracy, who was a presentations expert, 25 somebody who talks about how to deliver a presentation.</p>
<p style="text-align: right;">70</p> <p>1 Q. Anything else you do at Scott R. Ellis 2 Consulting? 3 A. Not that would be relevant. 4 Q. So we have covered all the relevant experience 5 you gained at Scott R. Ellis Consulting that was applied 6 to this report? 7 A. Yes. 8 Q. And have we covered all the experience at kCura 9 Corporation that was relevant to this report? 10 A. I believe so. I'm not going to answer that and 11 say conclusively, because it would take me a couple of 12 hours to go through the entire report. 13 Q. Understood. All right. We are just going to go 14 a little bit longer, if that's okay. I want to get us 15 out of here at a reasonable hour tonight. So if that's 16 okay with you, I want to press ahead rather than take a 17 bunch of breaks. But if you need a break at any point, 18 just let me know. 19 A. Okay. I could use a break right now, if that's 20 okay. 21 MR. ARENSON: All right. Let's take a break and 22 go off the record. 23 (A brief recess was taken.) 24 MR. ARENSON: Back on the record. 25 ///</p>	<p style="text-align: right;">72</p> <p>1 And we did that for a group of -- we did that 2 for two different groups of people that had -- that were 3 members of -- that were from Latin America. They were 4 from like foreign business owners that wanted to do 5 business in America. That was a training program that 6 was run by the Department of Commerce. 7 Q. Okay. Let's go back to your report, which we 8 have marked as Exhibit 1, and I would like to take you 9 back in time to when you were preparing this report. 10 Who did you talk with in the process of 11 preparing your report? 12 A. Carolyn. 13 Q. Okay. Anyone else? 14 A. I was working at RGL at the time, and I had 15 people, technicians, that I might ask them, hey, set up 16 a VM for me, install a software, do this, do that, kind 17 of stuff. 18 Q. The technicians would install which software? 19 A. Like the VM, the Windows XP, they would install 20 on a VM. 21 Q. So they would install the operating system or 22 are you talking about the actual files you tested? 23 A. The operating system, and in the very beginning 24 I had a technician that installed and did some screen 25 shots for me of the software that we were testing.</p>

<p style="text-align: right;">73</p> <p>1 Q. Okay. And how did that work? Were you sitting 2 over his shoulder, or her shoulder, while he was taking 3 those screen shots or did he just kind of operate 4 independently? 5 A. Some of the time, little bit of both. 6 Q. So at some point you were sitting over watching 7 the technician -- why don't he give him a name. 8 A. Joe. 9 Q. So Joe would take some screen shots for the 10 files that you tested in your report, and at some points 11 you were standing over Joe's shoulder and at some points 12 Joe was acting independently and taking shots on 13 his own. 14 A. Yes. 15 Q. And do you remember which programs that Joe took 16 screen shots of? Was it all of them or just some of 17 them? 18 A. No. It was just DriveCleaner and WinFixer. I 19 think those were the two. I ended up really redoing 20 everything so that I could see it for myself. That was 21 the initial phase, just take a look at this and let me 22 know what you find and let's take a look at it, and then 23 I reviewed it and then I ended up redoing everything 24 again at a later date. 25 Q. The screen shots in your report, did Joe --</p>	<p style="text-align: right;">75</p> <p>1 Q. And why did you ask Joe to take screen shots? 2 A. Probably because I was busy at the time. 3 Q. Okay. So you told me that Joe did screen shots 4 of DriveCleaner and WinFixer, you think. Could there 5 have been more programs or are you sure those are the 6 only -- 7 A. No. I'm sure those would be the only two. 8 Q. Let me finish my question because the court 9 reporter will get mad at me. 10 So you are sure those are the only two? 11 A. Yes. 12 Q. Okay. All right. So you talked to Joe. What 13 did you and Joe talk about? 14 A. The functionality of the software. 15 Q. And what did Joe tell you? 16 A. That it -- the software said that it would do 17 certain things and that it did it. 18 Q. And was there a specific piece of software that 19 he was taking about or was it just in general 20 DriveCleaner and WinFixer, I guess? 21 A. It was both of them. 22 Q. So he said to you that DriveCleaner and WinFixer 23 said they would do something and they actually did it. 24 A. Yeah. 25 Q. And did you rely on that in your report?</p>
<p style="text-align: right;">74</p> <p>1 A. No. Everything that is in my report I did 2 personally. 3 Q. Okay. So what did you do with the screen shots 4 that Joe took? 5 A. Oh, I couldn't tell you what happened to them 6 eventually. 7 Q. Are they still around? 8 A. Probably not. Probably not. 9 Q. Deleted them? 10 A. Yeah. 11 Q. Did you or Joe take notes during the process of 12 testing the software? 13 A. You know, I developed my report. That's really 14 where I -- that's my working environment, is my report. 15 Q. So -- 16 A. And the documents -- that's where the screen 17 shots would end up, in the documents, which you have. 18 Q. So were there notes that you took in addition to 19 your report, or is this the sum volume of everything? 20 A. No. 21 Q. What about Joe? 22 A. No. I mean -- no. Just screen shots and 23 that's it. 24 Q. Okay. What else did Joe do? 25 A. That was it.</p>	<p style="text-align: right;">76</p> <p>1 A. His statements to me? I relied on that to make 2 my decision about whether or not to progress with the 3 case. That was like an initial exploration to find out 4 is it complete vaporware or does it work, does it do 5 anything. 6 I wasn't going to spend my time, you know, 7 working on something where the initial examination would 8 prove out that it was just not even worth looking at. 9 Q. Why don't we take a step back. You were 10 approached by Carolyn at some point? 11 A. Yes. 12 Q. Did that come out of the blue or did you two -- 13 MS. GURLAND: Are we talking about in 14 preparation of this report? So this report that's 15 dated, you know, whenever -- for this report and this 16 engagement, is that what you are asking? 17 MR. ARENSON: Well, I mean you raise an 18 interesting question. 19 BY MR. ARENSON: 20 Q. Do you two have a preexisting professional 21 relationship? Does she use you as a consultant in other 22 cases? 23 A. It has been a few years, but, yeah, I worked 24 with her on another case in the past. 25 Q. What case was that?</p>

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1 A. That was the Fabio v. Carani, C-a-r-a-n-i, case.

2 **Q. And what was that case about?**

3 A. That was about a man who had been using piece of
4 software called Limeware -- I'm sorry, Kazaa, K-a-z-a-a,
5 and he had been downloading pornography, and he had
6 downloaded things that the -- that ICE, I-C-E, had
7 intercepted like overseas, so they got involved and then
8 he was charged with a crime.

9 And then my job was to take a look, do a
10 forensics examination of his computer, and find out to
11 what extent it was intentional or not intentional. That
12 involved looking at temporary Internet files and his is
13 Kazaa database and booting the machine -- booting a
14 virtual copy of the machine and examining its behavior
15 and looking for things like virus infections.

16 **Q. And is that the only case that you have worked**
17 **with Ms. Gurland on or have there been others?**

18 A. Yes, that was the only other one.

19 **Q. So how did she come to retain you in this case?**

20 A. She called me up.

21 **Q. What did she tell you in that first phone call?**

22 A. That there was some software that she needed
23 examined and that she thought it was right up my alley,
24 something that I could do.

25 **Q. Okay. And then what happened next?**

1 has to do with the United States' Attorney's Office and
2 some things that he did that are separate but not
3 unrelated to what's in this report.

4 MR. ARENSON: Okay.

5 MS. GURLAND: That predates this report.

6 MR. ARENSON: That's fine. What's the
7 distinction?

8 MS. GURLAND: The distinction is that if you
9 want to ask him about -- I just want to know when you
10 are asking questions and when he is answering, I want to
11 make sure that everyone's on the same page. I want to
12 know if he is talking about -- at which phase, at the
13 initial phase where he is preparing something that
14 wasn't for the FTC and at a later phase where he was,
15 because I think that distinction would be meaningful to
16 you.

17 MR. ARENSON: Okay.

18 BY MR. ARENSON:

19 **Q. As we go through this you can feel free to**
20 **clarify if this was work done for your report or done**
21 **for some other work that you did for Ms. Gurland.**

22 A. The Joe work would have been done for the other
23 work. I wasn't making a distinction between the two,
24 but that work would have been for the initial
25 examination that we did for the --

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1 A. We did an engagement letter and I began -- I
2 began working on the case.

3 **Q. And is this when Joe started testing the**
4 **software?**

5 A. Yes.

6 **Q. Okay. So Joe took a look at DriveCleaner and**
7 **WinFixer and told you that they did what they said they**
8 **were going to do.**

9 A. That's right.

10 **Q. And then what happened next?**

11 A. And then I basically took the reins of the
12 examination and reviewed his work, asked him for a fresh
13 VM with Windows XP on it, and basically redid the work
14 and examined it for myself.

15 **Q. So did Joe create all the VM machines that you**
16 **used?**

17 MS. GURLAND: Can I just -- for clarification,
18 because there is -- we need a time frame of what -- of
19 what investigation that we are talking about with me in
20 this case, because there is this -- I think there is
21 some confusion already.

22 If we want to talk about this report that was
23 turned in March 26th in connection with the FTC case,
24 there are a certain set of answers about what he did,
25 but there is also a role that he had in this case that

1 **Q. Just so I understand, so Ms. Gurland called you**
2 **and sent you some software but this was in connection**
3 **with the potential criminal case, not the civil case?**

4 A. Yes. That would be true.

5 **Q. And how was that explained to you?**

6 A. That it was a -- that there was a criminal case.

7 **Q. Was the civil case mentioned?**

8 A. Not -- I don't recall at that time if it was
9 mentioned that there would be a civil case also or if
10 they were the both or if the one turned into the other
11 one. I'm definitely not an expert on being a lawyer so
12 I'm not that familiar.

13 **Q. Okay. Do you remember when this was? When were**
14 **you first approached by Ms. Gurland?**

15 A. It was -- I want to say it was about two years
16 ago, a little under, maybe a year and 10 months ago.

17 **Q. Okay. So it is -- help me with the dates. It**
18 **is October 2010, so we are talking about January of**
19 **2009; is that right?**

20 A. Maybe it was as far back --

21 MS. GURLAND: I was not yet pregnant with Cole.

22 A. (Continuing.) She became pregnant with Cole
23 shortly after.

24 MS. GURLAND: Who is 10 months old.

25 A. (Continuing.) All right. So it was roughly 20

<p style="text-align: right;">81</p> <p>1 months ago.</p> <p>2 BY MR. ARENSON:</p> <p>3 Q. Can you give me a month and a date because I'm</p> <p>4 not good at math?</p> <p>5 A. You are not good at math?</p> <p>6 Q. Terrible.</p> <p>7 A. So it is almost October now so for all intents</p> <p>8 and purposes let's say it is the beginning of October,</p> <p>9 which is the 10th month. So if we go back -- if we were</p> <p>10 to go back nine months it would actually be January 1st,</p> <p>11 right? January 1st and that would be nine months ago,</p> <p>12 and then nine plus 12, 21.</p> <p>13 Q. So we are talking January 1st, 2009.</p> <p>14 MS. GURLAND: If you know. If you know an exact</p> <p>15 date --</p> <p>16 A. I don't know an exact date. I would have to --</p> <p>17 BY MR. ARENSON:</p> <p>18 Q. But you think it was on or about January</p> <p>19 of 2009.</p> <p>20 A. On or about.</p> <p>21 Q. Okay. And at the point where Ms. Gurland called</p> <p>22 you in January 2009, on or about, she mentioned the</p> <p>23 criminal case but didn't make any mention to the civil</p> <p>24 case.</p> <p>25 A. I don't recall.</p>	<p style="text-align: right;">83</p> <p>1 A. That's right.</p> <p>2 Q. And the first time you remember thinking of the</p> <p>3 civil case was when?</p> <p>4 A. Probably after those reports were delivered,</p> <p>5 which would have been about a year -- I think it was</p> <p>6 April of last year that those were delivered. Maybe</p> <p>7 even further back.</p> <p>8 MR. ARENSON: Let the record show that Carolyn</p> <p>9 is motioning him backwards.</p> <p>10 MS. GURLAND: I think he doesn't know the dates</p> <p>11 so I don't want there to be confusion. These are facts</p> <p>12 that exist so --</p> <p>13 MR. ARENSON: All he can tell us is what he</p> <p>14 knows.</p> <p>15 THE WITNESS: There you go.</p> <p>16 BY MR. ARENSON:</p> <p>17 Q. Okay. So you -- all the work that Joe did, is</p> <p>18 it your testimony that Joe did work exclusively for</p> <p>19 these criminal reports that you put together?</p> <p>20 A. Yes.</p> <p>21 Q. And Joe had nothing to do with this civil report</p> <p>22 that you put together.</p> <p>23 A. No.</p> <p>24 Q. Okay. So let's get back to this report and who</p> <p>25 you spoke with. You said you spoke with Ms. Gurland on</p>
<p style="text-align: right;">82</p> <p>1 Q. When did you first understand the distinction</p> <p>2 between the civil and the criminal case?</p> <p>3 A. Well, I created a couple of reports for the</p> <p>4 criminal case.</p> <p>5 Q. Okay.</p> <p>6 A. And then I would say it was a year ago, a</p> <p>7 year -- about a year ago that we began to focus on the</p> <p>8 civil case, I think. I apologize. I didn't --</p> <p>9 Q. All you can tell me is what you remember so</p> <p>10 that's fine.</p> <p>11 So you prepared a series of reports for the</p> <p>12 criminal case. Do you know what was done with those</p> <p>13 reports?</p> <p>14 A. No. Well, they were delivered to the</p> <p>15 federal defenders -- or not the federal defenders. Help</p> <p>16 me out here.</p> <p>17 MS. GURLAND: United States' Attorney's Office.</p> <p>18 THE WITNESS: Yeah.</p> <p>19 A. The United States' Attorney's Office.</p> <p>20 BY MR. ARENSON:</p> <p>21 Q. Okay. So you did reports that were delivered to</p> <p>22 the United States' Attorney's Office.</p> <p>23 A. Yes.</p> <p>24 Q. And then you wrote a separate report, obviously,</p> <p>25 for this case.</p>	<p style="text-align: right;">84</p> <p>1 numerous occasions; is that fair?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And after the initial -- well, I guess it</p> <p>4 is a little more complicated because you were retained</p> <p>5 initially for the criminal case, as I understand it.</p> <p>6 A. Right.</p> <p>7 Q. What was your first discussion with Ms. Gurland</p> <p>8 about the civil case and preparing this report?</p> <p>9 A. That the software needed to be tested; that I</p> <p>10 would be testing the software again and that there would</p> <p>11 be new software to test.</p> <p>12 Q. Which software did you test in connection with</p> <p>13 the criminal report?</p> <p>14 A. That was the DriveCleaner and WinFixer. I</p> <p>15 believe those were the two that were tested.</p> <p>16 Q. Okay. So the sum total of the criminal report</p> <p>17 was just DriveCleaner and WinFixer.</p> <p>18 A. That's right.</p> <p>19 Q. Okay. So your first conversation that you</p> <p>20 recall with Ms. Gurland is -- about the civil case is we</p> <p>21 need to test more software.</p> <p>22 A. That's right.</p> <p>23 Q. And then what happened next?</p> <p>24 A. Then I was given a FTP access to an account</p> <p>25 where I could download the software that we believed</p>

<p style="text-align: right;">85</p> <p>1 correlated with the software that we needed to be 2 examining. 3 There was some uncertainty as to exactly which 4 software would be examined and lacking that 5 clarification in the reports that I had seen -- I had 6 also received some reports. And lacking clarification 7 as to exactly what the MD5 hash was of the software, 8 Carolyn said -- you know, gave me a list of items to 9 test. 10 Q. So backing up. There was a lot there. 11 FTP access to what? 12 A. To an FTP server. 13 Q. And who controlled that server? 14 A. I don't know. 15 Q. So -- well, I mean, do you have any idea? 16 A. I have no idea. 17 Q. So Carolyn just gave you a series of numbers and 18 you punched them into your FTP program and you went 19 there. 20 A. Yes. 21 Q. No questions asked. 22 A. No. I may have asked, you know, where is this 23 thing, whose is it, but I don't recall that there was an 24 answer; that it was something to do with -- I think the 25 private investigator had arranged it somehow. I really</p>	<p style="text-align: right;">87</p> <p>1 of thing. 2 Q. And do you remember when this meeting was? 3 A. No, I don't. 4 Q. Do you remember a year? 5 A. It would be February, possibly, of 2009. 6 Q. Okay. And was it your understanding that 7 someone had tested the software before you got it? Were 8 you the first one to do a test on this software, is my 9 question? 10 A. To my knowledge, there was another expert 11 working with another defendant that had done some work 12 on it. 13 Q. And that's -- 14 A. And there was another company that had been 15 initially contacted to do some work on the software. I 16 don't know if they tested it. I don't think they tested 17 it. I don't know if they actually got to the point 18 where they tested it or not. 19 Q. Another company contacted by who? 20 A. Like another company that got contacted by the 21 client, by Kristy Ross, that worked through Carolyn or 22 Winston & Strawn with this other company. 23 Q. Do you remember anything about that other 24 company? 25 A. No. They were an offshoot from Navigant maybe.</p>
<p style="text-align: right;">86</p> <p>1 don't -- I don't know. 2 Q. Who is the private investigator? 3 A. I don't know his name. 4 Q. Have you had any interaction with the private 5 investigator? 6 A. I met with him once not -- prior to this with 7 respect to the criminal defense. 8 Q. Okay. 9 MR. ARENSON: Go off the record for just one 10 second. 11 (An off-the-record discussion was had.) 12 MR. ARENSON: Back on the record. 13 BY MR. ARENSON: 14 Q. Was his name Jack Paladino? 15 A. That rings a bell. 16 MR. ARENSON: Thanks to Colleen. 17 BY MR. ARENSON: 18 Q. What was your interaction with Jack Paladino? 19 A. We met once and said hi. It was very cordial 20 and professional and cursory. It was just kind of a 21 meet and greet. 22 Q. No talk about the case? 23 A. Really no. It was more talking -- asking me 24 about my background. It was kind of like an interview, 25 what is your background, what have you done, that kind</p>	<p style="text-align: right;">88</p> <p>1 Q. Did you have any discussions with them? 2 A. No, none. 3 Q. Okay. So we are going back to the very early 4 days of the engagement. You -- and just tell me 5 again -- the software was given to you from an FTP 6 server, you were given a location to download the 7 software, and you were told which files to test? 8 A. Yes. 9 Q. And were just those files present on the FTP 10 server or were there a huge number of files, do you 11 remember? 12 A. I believe it was just those files. 13 Q. I would have to look. I think you tested six or 14 nine files, somewhere in that range. It was less 15 than 10. 16 A. It was less than, because there was the ones 17 that I tested; then when I got the materials -- the FTC 18 materials, I didn't have those in the beginning. 19 Q. Okay. 20 A. I didn't have any drives. I didn't have 21 anything. Then once I got those, then I tested from the 22 FTC materials, the FTC's media. I tested some files 23 from there. 24 Q. I'm a little confused in the timing here. So 25 when you wrote your report, did you base the conclusions</p>

<p style="text-align: right;">89</p> <p>1 in your report on just the FTP downloads or was it based 2 on the FTC hard drive you were provided? 3 MS. GURLAND: When you say "report," there were 4 several reports, so maybe it would be good to make a 5 distinction as to which report. 6 BY MR. ARENSON: 7 Q. The only report that I'm talking about, unless I 8 make another reference saying I'm not, is the report in 9 your civil case. When you wrote your report in this 10 civil case, the one we are here about today, did you 11 base your analysis on the files from the FTC hard drive 12 or was it solely on the FTP site? 13 A. There is an MD5 hash that's listed with each 14 software that I tested. 15 Q. Uh-huh. 16 A. And I -- my recollection is that all of these 17 MD5 hashes match up with the MD5 hashes that were on the 18 disk. 19 Q. Okay. What about the FTP site? Was that for 20 the criminal report that you wrote and had no relevance 21 here, or did you pull files off the FTP site for this 22 case? 23 A. I would -- I believe that -- for this case I 24 think that the FTP was relevant only for the criminal 25 case, I believe.</p>	<p style="text-align: right;">91</p> <p>1 verify. It is certainly something that I'm capable of 2 checking using standard MD5 hash. I believe that all 3 the MD5 hashes that I tested were on that -- the FTC 4 media. That's my understanding right now. 5 Q. Okay. 6 A. But it is something that I would want to reserve 7 the right to verify that, and I could certainly get back 8 to you with an answer on that. 9 Q. So when you say the MD5 hashes were all present 10 on the FTC hard drive, what exactly are you referring 11 to? What do those MD5 hashes match to? 12 A. They would match to files that were on the FTC 13 media. 14 Q. Would those be different on the FTP site? 15 A. Not if they were -- if it was the same software 16 and the MD5 hashes matched, then it would be the same 17 software. 18 Q. So the MD5 hash values probably don't tell you 19 whether you got them from the FTP site or the hard 20 drive, do they? 21 A. No. But they would tell me whether or not they 22 are the same piece of software. 23 Q. So the underlying question, which was did you 24 get it from the FTP site or the hard drive, that's not 25 answerable from the MD5 hash.</p>
<p style="text-align: right;">90</p> <p>1 Q. Because you told me for the criminal case you 2 only tested -- 3 A. That's my recollection. 4 Q. For the criminal case you told me you tested 5 DriveCleaner and WinFixer; right? 6 A. Right. 7 Q. So were there only two files on the FTP server? 8 I thought you said there were like six or nine or 10. 9 MS. GURLAND: That misstates what he said. He 10 never ever said that there were six or nine or 10. 11 There were two. 12 MR. ARENSON: That's not how I recall it but -- 13 BY MR. ARENSON: 14 Q. Correct me if I'm wrong. 15 A. I think there is some confusion as to when the 16 FTP was used. To my recollection, everything that I 17 tested was on the FTC media. 18 Q. Are you sure? 19 A. I need to look through this report. 20 Q. That's fine. 21 A. I don't believe I made mention of exactly which 22 ones. 23 Q. I don't want you to guess, so if you are not 24 sure, let me know. 25 A. I'm not sure but it is certainly something I can</p>	<p style="text-align: right;">92</p> <p>1 A. No. But in the beginning I believe I did test 2 some pieces of software before I had access to the FTC 3 media that was not on -- that was from the FTP site and 4 it was not on the media, and I believe that's why it 5 would have been eliminated from my final report. That 6 would be the standard forensic methodology, right, 7 which -- 8 Q. Okay. 9 A. Clearly the forensics in this case were very, 10 very difficult simply because I don't know where the FTC 11 stuff came from either. 12 Q. Right. You don't have any information about 13 where the FTC got its information. 14 A. It was -- my understanding it was somebody in 15 Germany that accessed it and put it together. Other 16 than that, I know nothing. I don't know where he got it 17 or how he accessed it. I don't know if there was a 18 change in custody that I haven't seen. I don't know if 19 there was a search and seizure that was done. It 20 doesn't appear that there was. 21 It appears as though these files just appeared 22 off of the Internet and the FTC received them. I make 23 considerable comment in my report about the origination 24 of these files and the dates created of these files, and 25 it is nothing -- I mean, it is nothing less than bizarre</p>

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1 where this came from and how this whole case has played
 2 out. And it has not been the standard way that a
 3 forensic investigation would be undertaken at all.
 4 Typically in an investigation the other side
 5 sends me a drive, there is chains of custody, they know
 6 where it came from. In this case I don't have anything
 7 on it.
 8 **Q. So you don't know where the data came from, but**
 9 **you believe -- and tell me if I'm wrong -- you believe**
 10 **that all the data you have seen came from a researcher**
 11 **in Germany?**
 12 A. I wouldn't -- I couldn't even use the word
 13 researcher. I don't know. A man in Germany.
 14 **Q. So you think that all the data you looked at**
 15 **came from a man in Germany.**
 16 A. I don't know if all of it. Some of it possibly.
 17 **Q. You don't know one way or the other.**
 18 A. I don't know which way or the other, from up or
 19 down.
 20 **Q. So getting back to your testing of the software.**
 21 **So at some point -- and we are not exactly sure of the**
 22 **date -- Ms. Gurland provided you with the FTC hard**
 23 **drive; is that accurate?**
 24 A. Yes.
 25 **Q. And this was after the FTP download?**

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1 A. Yes.
 2 **Q. Now, when you received the hard drive, did**
 3 **you -- what was your process in looking at the files on**
 4 **the hard drive?**
 5 A. Well, I accessed the hard drive and there was
 6 forensic images on the hard drive and I copied them onto
 7 a disk and then I used EnCase to open them and review
 8 them.
 9 One of them had an invalid partition that I had
 10 to rebuild, and I reviewed the files and I looked -- ran
 11 an MD5 hash. I built the MD5 hash against the files so
 12 I would have that available so I would know what I was
 13 testing.
 14 **Q. Okay. And at some point you made a decision to**
 15 **test some of the software; correct?**
 16 A. Right.
 17 **Q. Who made that decision?**
 18 A. I believe a lot of that was driven by the FTC.
 19 **Q. Okay.**
 20 A. In that at some point we received the MD5
 21 hashes -- I believe his name is Kevin Johnson, the
 22 Johnson report, one of his later reports he decided to
 23 include the MD5 hashes, so then I could check and see if
 24 what I had been running and testing matched the software
 25 that he was testing, because I wanted to test the same

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1 stuff he was testing.
 2 That was important to me to have that degree of
 3 forensic certainty; that I'm, in fact, looking at the
 4 same thing that he is looking at and that I can, in
 5 fact, experience -- watch the software operate in the
 6 same way that he would have been able to had he chosen
 7 to do so.
 8 **Q. One of the things you were doing here was**
 9 **analyzing Kevin Johnson's methodology; is that accurate?**
 10 A. That's accurate.
 11 **Q. And it would be important to test the same files**
 12 **that Mr. Johnson tested in order to do that.**
 13 A. Yes.
 14 **Q. So you indicated that -- and when you say the**
 15 **FTC decided which files you should test, you really mean**
 16 **that Kevin Johnson did, because he picked out files and**
 17 **then you did the test based on what he picked out; is**
 18 **that accurate?**
 19 A. I would have to assume he received his direction
 20 from the FTC.
 21 **Q. But you don't know one way or the other.**
 22 A. No.
 23 **Q. But the important part is you based your testing**
 24 **regimen based on what Kevin Johnson did.**
 25 A. Yeah. There was software that -- I would have

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1 to say my recollection is that there was also software
 2 that we wanted to test because we felt that it had been
 3 a subject of conversation perhaps. I received some
 4 things in that direction from Carolyn.
 5 But when we looked at it and I said, well,
 6 here's the ones, I have these, and the regimen of what I
 7 tested was ultimately decided by Carolyn Gurland.
 8 **Q. So she told you which files to test and which**
 9 **ones not to test.**
 10 MS. GURLAND: Was there testimony that I told
 11 him about what files not to test? I didn't know there
 12 was testimony --
 13 BY MR. ARENSON:
 14 **Q. Well, it would seem that if she told you to test**
 15 **these files but none others, then that would by**
 16 **definition mean that there were some that you weren't**
 17 **supposed to test.**
 18 MS. GURLAND: And "none others" is the problem.
 19 I don't think he testified to that. You can ask him
 20 that question, that I told him not to test some files.
 21 BY MR. ARENSON:
 22 **Q. Well, did she tell you to test all the files on**
 23 **the hard drive or --**
 24 A. She didn't tell me not to test anything.
 25 **Q. Did she tell you to pick out the files that look**

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1 interesting to you?

2 A. No. There was far too many.

3 **Q. Did she say do a random sampling and let me know**
4 **what happens?**

5 A. No.

6 **Q. She told you to test these specific files.**

7 A. She told me to look for these particular ones
8 with these particular titles in the file name, and at
9 that point there would be a number of them and I would
10 check the MD5 hash and then -- it is in my report what
11 materials I relied on.

12 **Q. But she never said test these files and whatever**
13 **other ones you want.**

14 A. She never told me to -- no. No.

15 **Q. Okay. I mean, it seems like a simple question.**
16 **She told you which files to test and you tested them.**

17 A. Right.

18 **Q. And none others.**

19 A. I did not test anything else, no.

20 **Q. Okay.**

21 A. But, let me be clear, she didn't tell me not to.
22 She didn't say -- you said -- a moment ago you said did
23 she ask you to -- did she tell you to test these files
24 and none others. No, she didn't say that. She said
25 test these files.

1 A. Yes.

2 **Q. Did she tell you anything else?**

3 A. Not that I can recall.

4 **Q. Okay.**

5 A. She may have mentioned -- again, I think it was
6 understood that these were part of the case.

7 **Q. Okay. So she gave you your instructions to test**
8 **the files. Do you know whether previous to you**
9 **receiving those instructions if anyone else had tested**
10 **the other files on the FTC hard drive?**

11 A. No, I don't know.

12 **Q. Okay. Did you ask?**

13 A. I don't know. No, I don't think I asked.

14 **Q. Okay. So we have established that you tested**
15 **the files, and we'll talk about the ones you tested in**
16 **detail a little bit later.**

17 **What was the next conversation you had with**
18 **Ms. Gurland?**

19 A. I didn't keep notes on every conversation that
20 we had.

21 **Q. I'm not asking for your notes.**

22 A. It would have just been things like did you read
23 the Johnson report or I'm trying to get this material or
24 I would ask -- well, I would explain that the Johnson
25 report listed some software and I'm looking at this

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1 **Q. And you never tested any files other than those,**
2 **other than the exact ones she told you to test.**

3 A. Not to my recollection, no.

4 **Q. Okay. So you selected the files that**
5 **Ms. Gurland told you to test and you proceeded to test**
6 **them.**

7 **Did Ms. Gurland explain to you why those**
8 **specific files should be tested?**

9 A. Yes. Because they were IMI files and they were
10 programs that IMI had developed.

11 **Q. So she said you should test these files because**
12 **they are IMI developed.**

13 A. And because they were relevant to this case.

14 **Q. Exactly -- as best you can recall, what exactly**
15 **did she tell you? Did she say because they were**
16 **relevant? That doesn't sound like something she would**
17 **tell you. Maybe it is but it doesn't sound like a**
18 **conversation you would have, but if it is you can tell**
19 **me.**

20 A. I don't recall the exact words of the
21 conversation. All I can say is I received my direction
22 from her.

23 **Q. I understand. But what's your best recollection**
24 **of the conversation? You told me she said that these**
25 **files were IMI products; is that accurate?**

1 thing and I don't know which ones they are. Can we
2 figure this out. Is there any way to figure out -- to
3 find out, you know, which files I really need to be
4 testing for this case. I wanted to have this clear
5 focus of what do I need to be looking at.

6 **Q. I think we talked that part of your process**
7 **would be testing the same files that Kevin Johnson**
8 **tested; right?**

9 A. Part of my process would be to test, yes.

10 **Q. Because in order to critique his methodology,**
11 **you would need to test the same files.**

12 A. That's right.

13 **Q. Okay. So you told her -- and I just want to**
14 **keep -- as many of these conversations as you can**
15 **recall, I want to keep going.**

16 **So you told her that you read the Johnson**
17 **report. What happened next?**

18 A. I think there was a lot of back and forth, and
19 eventually we received the hard drive. I think I had
20 the hard drive already but eventually Johnson provided
21 the MD5 hashes of the report of the items that he
22 examined. And I also believe at one point I received
23 the MD5 hashes for files that IMI -- you know, were IMI
24 programs.

25 **Q. Okay. Who gave you those?**

<p style="text-align: right;">101</p> <p>1 A. That would have come from Carolyn.</p> <p>2 Q. Okay. And was there any discussion at that</p> <p>3 point of how it was determined that they were IMI</p> <p>4 programs?</p> <p>5 A. You know, I can only speculate.</p> <p>6 Q. Well, you can just answer the question. It is</p> <p>7 easier. Was there any discussion at that point as to</p> <p>8 how it was determined that they were IMI programs?</p> <p>9 A. No.</p> <p>10 Q. Okay. What happened -- what was the next</p> <p>11 conversation you recall?</p> <p>12 A. I would have -- more than likely the next</p> <p>13 conversation would be talking about, you know, next</p> <p>14 steps and maybe amount of time that would be involved</p> <p>15 and where I was at with the investigation, you know, had</p> <p>16 I finished testing, that kind of thing.</p> <p>17 Q. Okay. And then what happened next?</p> <p>18 A. Eventually I provided a report on my findings.</p> <p>19 Q. Did you give -- the draft of your report that we</p> <p>20 have in front of us, is this the draft that you wrote or</p> <p>21 did Ms. Gurland have comments or suggestions or</p> <p>22 critiques or revisions?</p> <p>23 A. She had questions about, you know, things she</p> <p>24 wanted clarified.</p> <p>25 Q. What were those questions?</p>	<p style="text-align: right;">103</p> <p>1 Q. Okay. Other than wording changes, were there</p> <p>2 any substantive changes that Ms. Gurland recommended?</p> <p>3 Testing one program versus another, how you described a</p> <p>4 certain program, anything like that?</p> <p>5 A. I think at one point I had been testing the</p> <p>6 wrong program, and I had to kind of throw that out and</p> <p>7 test a different one based on the MD5 hashes that we</p> <p>8 received.</p> <p>9 Q. Which program did you test that was the wrong</p> <p>10 one? Do you recall?</p> <p>11 A. It was WinAntivirus, I think.</p> <p>12 Q. Why was it the wrong one?</p> <p>13 A. Because it wasn't the one that Kevin Johnson had</p> <p>14 tested.</p> <p>15 Q. And your goal was to test the exact same</p> <p>16 software that Kevin Johnson tested.</p> <p>17 A. That was one of my goals, yes.</p> <p>18 Q. So what happened next? What was the next</p> <p>19 conversation?</p> <p>20 You deliver your report to Ms. Gurland, and, as</p> <p>21 I understand it -- and correct me if I'm wrong -- you</p> <p>22 don't recall any other conversations you guys had about</p> <p>23 the substance of your report.</p> <p>24 A. There were lots of conversations.</p> <p>25 Q. Can you recall any additional conversations you</p>
<p style="text-align: right;">102</p> <p>1 A. Perhaps I wouldn't have been as detailed or</p> <p>2 certainly -- you know, I talk with a lot of attorneys</p> <p>3 about a lot of different cases. At the time I was</p> <p>4 working a lot of cases. I really can't accurately</p> <p>5 recall a conversation I had with an attorney on any</p> <p>6 given day with respect to -- it is kind of the standard</p> <p>7 stuff with a report.</p> <p>8 Q. So your sworn testimony is you can't recall any</p> <p>9 conversation you had with Ms. Gurland about your report.</p> <p>10 A. I can't recall any specific exact conversation</p> <p>11 or moment in time. Give me a minute, I can think</p> <p>12 about it.</p> <p>13 Q. Okay. I don't need the replay of the</p> <p>14 conversation. I'm just interested in topics that you</p> <p>15 talked about. You said she had questions and you</p> <p>16 responded.</p> <p>17 A. You know, there would be like a -- you know,</p> <p>18 some verbiage that I would have written that wasn't</p> <p>19 clear that -- techno speak, maybe I was too technical,</p> <p>20 and maybe needed to make it a little easier to read.</p> <p>21 You know, this phrase doesn't make any sense,</p> <p>22 Scott. Can you rewrite this so it makes sense to me or</p> <p>23 can you explain it so it makes sense to me, that type of</p> <p>24 thing. And that would have gone on throughout the</p> <p>25 course of developing this report.</p>	<p style="text-align: right;">104</p> <p>1 had with Ms. Gurland about the substance of your report?</p> <p>2 A. Things like include your CV and, you know, the</p> <p>3 format. I mean, I use pretty much a standard report</p> <p>4 format, materials used, procedures, qualifications,</p> <p>5 assignment. Those were all things that I created, and</p> <p>6 then I don't -- I'm not really sure what you are</p> <p>7 asking me.</p> <p>8 We had lots of conversations about the</p> <p>9 development of this report, and I drove the development</p> <p>10 of this report. This is my report. These are my words.</p> <p>11 Q. Understood. I'm going to break this down into</p> <p>12 two categories. There are the substantive changes,</p> <p>13 which involved changes in the substance of what you have</p> <p>14 written here, and then there are technical changes,</p> <p>15 wording changes, format changes, what header to use,</p> <p>16 what -- that kind of thing.</p> <p>17 You don't need to tell me every heading change</p> <p>18 that Carolyn suggested. That's not what I'm interested</p> <p>19 in. I would like to focus on the substantive changes</p> <p>20 that were made or suggested by Ms. Gurland. Can you</p> <p>21 recall any of those?</p> <p>22 A. I would say the ones I have recalled I have</p> <p>23 outlined for you.</p> <p>24 Q. None others that you can recall.</p> <p>25 A. None others that I can recall. I imagine there</p>

<p style="text-align: right;">105</p> <p>1 were others but none that I can recall.</p> <p>2 Q. Okay. So you are done with the report and you</p> <p>3 give it to Ms. Gurland. Is that how it happened?</p> <p>4 A. Yes.</p> <p>5 Q. And then what was your next conversation with</p> <p>6 Ms. Gurland?</p> <p>7 A. We certainly -- well, that was an ongoing thing,</p> <p>8 right? I would do -- I would send it to her and review</p> <p>9 it and there would be changes and I would send her</p> <p>10 another copy.</p> <p>11 Q. How were the changes communicated?</p> <p>12 A. By phone.</p> <p>13 Q. So how many different revision cycles were</p> <p>14 there?</p> <p>15 A. I couldn't tell you.</p> <p>16 Q. Can you give me an estimate?</p> <p>17 A. Less than 10.</p> <p>18 Q. So more than five?</p> <p>19 A. Between five and 10.</p> <p>20 Q. So five or 10 different times the report went to</p> <p>21 Carolyn, she reviewed it, called you with changes, you</p> <p>22 would make them, it went back to Carolyn, and that</p> <p>23 process repeated itself five to 10 times.</p> <p>24 A. That would be standard in any report that's</p> <p>25 written by an expert, yeah. That's generally how it</p>	<p style="text-align: right;">107</p> <p>1 rebuttal report?</p> <p>2 MR. ARENSON: We can clarify.</p> <p>3 BY MR. ARENSON:</p> <p>4 Q. My question was what was the next conversation.</p> <p>5 You said beyond that, after your report was done, you</p> <p>6 had a series of questions about scheduling and am I</p> <p>7 going to have to testify.</p> <p>8 A. There was a rebuttal report. I just wasn't sure</p> <p>9 of the -- yes, the rebuttal report and we discussed the</p> <p>10 rebuttal report.</p> <p>11 Q. So now there was another substantive</p> <p>12 conversation after you completed your report and that</p> <p>13 was when the rebuttal report was issued.</p> <p>14 A. Right.</p> <p>15 Q. And what did you and Ms. Gurland discuss at that</p> <p>16 point?</p> <p>17 A. The rebuttal report.</p> <p>18 Q. What did you talk about in particular?</p> <p>19 A. Like the -- can I see the rebuttal report?</p> <p>20 Well, I think one of the things we talked about was the</p> <p>21 lack of response from Kevin Johnson about my criticism</p> <p>22 of his forensic techniques.</p> <p>23 Q. Okay. What else did you talk about?</p> <p>24 A. We talked about the -- you know, about how he</p> <p>25 talked about the -- you know, the invalid items found.</p>
<p style="text-align: right;">106</p> <p>1 works.</p> <p>2 Q. Was that a yes to my question?</p> <p>3 A. Yes. Sure.</p> <p>4 Q. Okay. So after that cycle of five to 10 changes</p> <p>5 occurred, what was your next conversation with</p> <p>6 Ms. Gurland?</p> <p>7 A. It was really -- there was other -- there was a</p> <p>8 point where the report -- other reports were issued. I</p> <p>9 didn't keep a timeline. If I had known I was going to</p> <p>10 receive all these questions, I would have kept a better</p> <p>11 timeline so I could explain all these things to you. I</p> <p>12 have never been asked questions at this level before</p> <p>13 about the process of creating an expert report.</p> <p>14 Q. All you can do is tell me what you know.</p> <p>15 A. All I can tell you is at one point the report</p> <p>16 was finished and sent to the FTC, and then the only</p> <p>17 other conversations that would have come along after</p> <p>18 that would have been am I going to be deposed, when am I</p> <p>19 going to be deposed, that kind of thing.</p> <p>20 Q. Okay. So after the completion of your report,</p> <p>21 you and Ms. Gurland never had any substantive</p> <p>22 conversations about this case other than scheduling</p> <p>23 issues; is that accurate?</p> <p>24 MS. GURLAND: You mean other than -- about his</p> <p>25 report or after we got the next report from -- the</p>	<p style="text-align: right;">108</p> <p>1 You know, I think this was a major point, where we talk</p> <p>2 about these invalid registry keys that were found and</p> <p>3 how Kevin Johnson says that there is no way that these</p> <p>4 could ever cause any damage on any system at any time</p> <p>5 anywhere, and we talked about how that was incorrect.</p> <p>6 Q. What did you specifically tell Carolyn?</p> <p>7 A. What I told her was that -- I explained to her</p> <p>8 what that registry key did. So I explained how that</p> <p>9 registry key is actually responsible for those popups</p> <p>10 that you see. When you click on a link and it says</p> <p>11 please download this file and you see a popup that says</p> <p>12 open or save to disk and then you click open and you</p> <p>13 might see -- it might ask you which file do you want to</p> <p>14 use to open that, basically this registry key controls</p> <p>15 when that popup appears.</p> <p>16 So if you go to a website and you click on a</p> <p>17 link to a file and that file has one of the extensions</p> <p>18 that's found in here -- these are basically the orphaned</p> <p>19 extensions -- basically what this is saying is that</p> <p>20 there are these extensions in this registry key that</p> <p>21 don't have programs associated with them, so if you</p> <p>22 click on a file on the Internet that has one of those</p> <p>23 extensions, that little popup pops up.</p> <p>24 If the extension that's on the file that you</p> <p>25 clicked on is not in here, that little popup won't pop</p>

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up. Does that make sense to you?

Q. I think so. What happens if it is not in here?

A. If it is not in here, it just turns into a dead link. Nothing happens.

Q. Okay. So you indicated that you and Carolyn talked about Kevin Johnson's conclusion that those registry keys -- I want to use your words -- could never ever cause these issues. What did you tell Carolyn in response to that?

A. I told her that his explanation of what that key does is wrong.

Q. Okay.

A. He clearly -- from his report he clearly doesn't know what that registry key does. And what I explained is that in the case of a malicious operator operating a website, if you use it to download and execute one of these files using one of these programs, then the program operator could conceivably take control of one's computer and execute the code of their choice.

Which is one of the most dire circumstances that you can have in any web-browsing circumstance; is where a remote operator has taken control of your computer and launched the code of his choice.

Q. Okay. So you talked about his conclusion with the registry keys.

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A. Yes.

Q. Were there other things that you talked about?

A. We can go through the report.

Q. Well, I mean, you can.

A. We talked about the flash ad and I -- and I explained that, you know, if you think about a company like Mediaplex and their software -- their website software that they use, you can think about it as an application. Okay? They are running an application and there is lots of people that have integrated into that application. And they have code on their websites that's going and getting and requesting ads based on things that the user is doing.

So my conclusion was that without looking at it, without having forensic images and WireShark capturers and a very good understanding of what's happening when the ad was seen, I can't just -- I can't just pick up a file and say with any degree of reasonable forensic certainty what that file was ever used for or how it was presented to a user. I just can't.

Q. Okay. So that was your discussion about the flash files. What else did you talk about?

A. So, actually, here -- yeah, here's what I was looking for before. So three of the softwares that I analyzed and the other three were just -- yeah. Again,

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I would have to go back and say I can't say with reasonable certainty, you know, what the purpose was of analyzing the code. It was just IMI software and we need to present that and that was it. That's all I can say about that.

Q. I'm sorry. I didn't follow that part. What are you talking about?

A. Well, on the second page of his report he talks about how, you know, we didn't have -- and I think at that point we didn't have all the -- my memory is fuzzy on that.

Q. I'm still unclear what you are talking about.

A. The three overlapping files, the ErrorPatrolFreeSetup, WinAntivirus2005ProScannerSetup, and PerformanceOptimizerFreeSetup, those were the three software tools -- the three software items that he tested that had MD5 hashes that matched. Do we have his original report?

Q. We do. But I'm a little bit concerned that we are getting beyond the question, which is conversations you had with Carolyn at the time.

Are you continuing to talk about that or are you now jumping into other conversations?

A. No. These were the topics of the conversations and it was about the forensics and we didn't have the

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MD5 hashes. I don't believe we had the MD5 hashes for the other software at this time.

MS. GURLAND: For the record, this is the first report, which is the same system contacts, which was the first Johnson report of February 22nd and I'm showing Mr. Ellis the page in which the software was --

A. All right. So he lists six different pieces of software here.

BY MR. ARENSON:

Q. And, again, I just want to be sure. This is a conversation that you and Carolyn had?

A. Yes. This is a conversation we had.

Q. Okay. Keep going.

A. There is six pieces of software listed here and this is his expert report and he is a forensic expert technologist presumably. And he lists six pieces of software here and there is no MD5 hash listed.

Q. Uh-huh.

A. Okay? The three that I did that were not listed in here would be our best guess as to which ones they were.

Q. The three that you did --

A. Or I think it was just two. I did not analyze AntiMalwareGuardFree; so ErrorClean and AntivirusXP2008Installer.

<p style="text-align: right;">113</p> <p>1 Q. We are going to dive into this deep in a minute, 2 so I don't know if you want to get into this now. 3 A. These were the conversations we had, was about 4 how inadequate it is to try to figure out what you guys 5 were doing and what he was doing and what he was 6 analyzing when he submits an expert report where he 7 doesn't even list an MD5 hash of what he did. 8 Q. So you and Carolyn had a discussion about him 9 not listing the MD5 hash, and what did you tell her? 10 That you were unable to find those files? 11 A. No. 12 Q. Did you tell her that you looked for them? 13 A. We had already made a best guess as to which 14 pieces of software he was talking about based on the 15 file names. 16 Q. So you looked at the original Kevin Johnson 17 report, and then you made your best guesses as to which 18 files he was talking about -- 19 A. With guidance from the client. 20 Q. Hold on. Let me finish my question. 21 You looked at the original Kevin Johnson report, 22 you made your best guesses as to which files he tested, 23 and then it was your goal to test the exact same files 24 that he tested. 25 A. That was the goal. That was what I had been</p>	<p style="text-align: right;">115</p> <p>1 Q. If you could turn to this page. And 2 unfortunately they are not numbered, but if you keep 3 flipping you will find this page. Are you there? 4 A. I'm there. 5 Q. These are the one, two, three, four, five, six 6 files that Kevin Johnson tested, right? And you -- what 7 I think you just told me -- correct me if I'm wrong -- 8 was that your goal was to test these exact same files. 9 A. No. One of the files is -- and I would want to 10 look at my -- do we have my attachments? 11 Q. Your attachments to what? 12 A. My attachments where I listed out all of the 13 screen shots and files. 14 Q. Those weren't turned over to us. What you have 15 got in front of you is what was given to us, so if there 16 are attachments, we don't have them. 17 MS. GURLAND: I don't have attachments. Do you 18 mean the separate material that was delivered to you 19 pursuant to a discovery request? 20 MR. ARENSON: You are talking about the -- 21 MS. GURLAND: Materials delivered pursuant to a 22 discovery request. 23 MR. ARENSON: There were documents turned over 24 to us. 25 A. Those have screen shots in them.</p>
<p style="text-align: right;">114</p> <p>1 saying all along, was that -- and the information was 2 not forthcoming -- 3 Q. Okay. 4 A. -- until he decided to include some MD5 hashes 5 in his rebuttal report. 6 Q. We're getting a little bit out of order but 7 let's not leave this. 8 Let's take a look at your report and we'll also 9 take a look at -- just a second. This is the first 10 Kevin Johnson report. I think you have the same thing 11 in front of you. 12 A. I do. 13 MS. GURLAND: Theirs is longer. 14 MS. ROBBINS: It has the attachments. 15 MS. GURLAND: If you are going to ask him about 16 it, I don't think ours has all the attachments that 17 she's talking about. 18 MR. ARENSON: I'm not going to ask him about the 19 attachments. 20 BY MR. ARENSON: 21 Q. So we are talking about the same report. And 22 Kevin Johnson in here lists the files that he tested; 23 right? 24 A. He says here that he was provided with a CD of 25 web files as well as a list of graphics.</p>	<p style="text-align: right;">116</p> <p>1 BY MR. ARENSON: 2 Q. I don't have the discovery materials that were 3 produced back to us. Those weren't part of your report, 4 were they? Or were they? 5 MS. GURLAND: Here is your report. 6 A. I did not include any screen shots. 7 MR. ARENSON: Let's let Mr. Ellis answer the 8 questions, Carolyn, please. 9 A. (Continuing.) I did not include any screen 10 shots in my report. 11 BY MR. ARENSON: 12 Q. Okay. So those weren't part of your report. 13 A. They are part of the materials that I turned 14 over. I had thought that they would be turned into 15 attachments. 16 Q. So you intended to include those as part of your 17 report. 18 A. Well, I intended to be able to have them to 19 refer to later so I could refresh my memory as to 20 exactly what software I looked at. Because to be able 21 to say was this AntivirusXP2008, was that one of the 22 ones I tested -- 23 Q. I think we can solve that because very helpfully 24 on the fourth page of your report you've listed all the 25 files you tested; is this right?</p>

<p style="text-align: right;">117</p> <p>1 A. Right. But give me a second here. I don't have 2 MD5 hashes on his report. 3 Q. I'm not asking about the MD5 hashes. I'm just 4 asking you this: You told me that you attempted to test 5 the same files that Kevin Johnson tested and six of 6 those are right there. And then these are the files 7 that you tested in your report right here; right? 8 A. Yeah. I didn't do that 2008 one. I don't know 9 why -- 10 Q. So do you want to rescind your statement that 11 you tried to test the same files that Kevin Johnson 12 tested? 13 A. I tried to test the files that he tested that I 14 was asked to test. 15 Q. Well, that's different, right? You didn't try 16 to test all the files that Kevin Johnson tested. You 17 took instruction from Ms. Gurland and tested those 18 files. 19 A. Yeah. But where there was an alignment between 20 the files that I was supposed to be testing and his 21 files, those are the ones where I really wanted to test 22 the same ones that he tested. Does that make more 23 sense? 24 Q. That makes perfect sense. So when you said that 25 you were trying to test the same files, you were trying</p>	<p style="text-align: right;">119</p> <p>1 A. Where is the report? Did you take it back? 2 Q. I did. 3 MS. GURLAND: It was ours, too. 4 MR. ARENSON: Maybe it was. We have got 5 one too. 6 BY MR. ARENSON: 7 Q. So you did not test AntivirusXP2008, ErrorClean, 8 or AntiMalwareGuard; right? 9 A. Yes. 10 Q. That's correct? 11 A. That's correct. 12 Q. And you asked Ms. Gurland why am I not testing 13 those files; correct? 14 A. That's correct. 15 Q. And her response to you was? 16 A. That they weren't IMI files. 17 Q. Did she tell you what the basis of her belief 18 was? 19 A. No. 20 Q. No explanation as to why they weren't IMI files? 21 A. That they weren't IMI files, yeah, that was it. 22 Q. No explanation. 23 A. No explanation. I didn't request an 24 explanation. 25 MR. ARENSON: Okay. If that's yours, you can</p>
<p style="text-align: right;">118</p> <p>1 to match up -- of the files you did choose to test, you 2 were trying to match up with the files that he tested. 3 A. That would be correct. 4 Q. But you didn't make any effort to test all the 5 files that he tested, because obviously you didn't. 6 A. That would be correct. 7 Q. Okay. All right. We are going to go back to my 8 outline, if you can give me that. 9 A. I'm glad we cleared that up. 10 Q. I'm glad we cleared that up too. 11 So back to our previous discussion. You spoke 12 with Ms. Gurland when the rebuttal report came in -- and 13 just before I leave that topic entirely: Did you ever 14 ask Ms. Gurland why you wouldn't test the same files 15 Kevin Johnson tested? 16 A. I did. 17 Q. What did she say? 18 A. They aren't IMI files. That was the answer, was 19 that they weren't IMI files. 20 Q. So for the three files you didn't test, she told 21 you those didn't belong to Innovative Marketing. 22 A. Were there three? I don't know. 23 Q. There is a discrepancy of three different files 24 between the files you tested and the files Kevin Johnson 25 tested.</p>	<p style="text-align: right;">120</p> <p>1 keep it. 2 MS. GURLAND: Yep, it is. 3 BY MR. ARENSON: 4 Q. So your next conversation with Ms. Gurland 5 after -- actually, I guess we are still working on the 6 rebuttal report. 7 So we talked about the rebuttal report earlier. 8 What other conversations did you have in that phone call 9 with Ms. Gurland about the rebuttal report? 10 MS. GURLAND: Can we have a time frame here? We 11 have been time traveling backwards and forwards. If we 12 are going to be talking about discussions with me, are 13 we talking about after we received the rebuttal report? 14 BY MR. ARENSON: 15 Q. We are actually still in the middle of the 16 conversation that you had with Ms. Gurland when the 17 rebuttal report came in. 18 A. And these conversations, I wouldn't say there 19 was one conversation where we sat down and talked about 20 everything. It would have been multiple conversations 21 over time talking about the report. 22 Q. Okay. 23 A. It was -- you know, certainly we talked about 24 things that he said in his report where he would say 25 things like -- I quote from the expert report of Kevin</p>

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1 Johnson, quote, These warnings have no chance of causing
2 the widespread havoc the warning message claims, end
3 quote.

4 And my response to that is that it is clearly
5 impossible to say without examining each and every
6 invalid -- certainly missing or invalid ComActiveX
7 entries can cause problems, certainly. And the problems
8 in the registry do cause problems on computers, and
9 whether or not it would be something that would cause
10 the computer like to shut down and die, no. But whether
11 or not it could cause issues with the computer and in
12 the use of the computer, yes.

13 **Q. What kind of issues?**

14 A. Windows XP certainly doesn't come out of the box
15 perfect. There is security flaws in it, as we have
16 already discussed.

17 **Q. All right. We are -- actually, we are going to
18 get into all of this after lunch, so I just want to
19 focus on the conversations that you had with
20 Ms. Gurland.**

21 A. Yeah. We talked about -- you said we are going
22 to get into this after lunch. We talked about the
23 WinAntivirusPro2005, you know, your
24 system-is-infected-banner that would pop up on the free
25 version.

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1 **Q. What did you talk to Carolyn about that?**

2 A. He talks about how he goes -- he goes to
3 Wikipedia to get his definition of what software is, and
4 I thought that was interesting. And, you know, a
5 software package is -- really constitutes and comprises
6 of any and every part of that software that's needed to
7 make it operate in a functional way, which would include
8 website cookies.

9 So if cookies are downloading to a site and
10 there's an application that comes along looking for
11 those cookies and it finds them and there is an exchange
12 of information between any two components of a software
13 system, those components are part of a software system.
14 That's basic.

15 **Q. That's something else you told Ms. Gurland.**

16 A. Definitely that's something I told Ms. Gurland.

17 **Q. Okay. What else?**

18 A. I believe that was the extent of our
19 conversations about this report. There may have been
20 more that I will recall later. If we continue to talk
21 about it, I may remember that I told something to
22 Carolyn. We certainly can't cover the period of several
23 years of conversations into a single day of deposition,
24 even if I could recall all of them.

25 **Q. Well, we can try.**

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1 **So after the rebuttal report, did you have
2 further conversations with Ms. Gurland?**

3 A. Certainly. We have met socially and had dinner.

4 **Q. That's a fair point. Specific to this case.**

5 A. We had conversations about this case up until,
6 you know, this morning talking about my testimony and
7 what I would -- and mannerisms and how to explain things
8 and what manner -- like at what level to explain things
9 and to try to keep things simple.

10 Because I do have a tendency to elaborate on
11 something if I don't -- I'm not sure that you are
12 understanding my point, I may just go on and on and on
13 until you tell me to be quiet. And that's the kind of
14 things we talked about.

15 **Q. Okay. And are you and Ms. Gurland social
16 friends as well?**

17 A. I think that we have become social friends since
18 this. Our families have gotten together maybe three or
19 four times in the past two years.

20 Do I see her every Friday night for drinks, no.
21 Yeah, I have two children of my own and a wife and a
22 very busy life outside of work, so socially we are
23 friends.

24 **Q. Okay. So since the report was finished, from
25 the time you handed it in to Ms. Gurland to give to us,**

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1 **have you reviewed additional documents from that point
2 to now?**

3 MS. GURLAND: Sorry. Can I -- since his --
4 Mr. Ellis' report was finished has he reviewed
5 additional documents other than the rebuttal report?

6 MR. ARENSON: Well, that would be one.

7 BY MR. ARENSON:

8 **Q. So we can start with the rebuttal report. We
9 have talked about that.**

10 **Were there other documents you have reviewed,
11 other than the rebuttal report which we discussed at
12 some length, relevant to this case obviously, since you
13 submitted your report?**

14 A. I'm looking at the report to see the list of
15 materials that I used to see if anything I have seen
16 since then is in my list already or not.

17 **Q. Okay.**

18 MS. GURLAND: Your question is after -- from
19 after March 26th when he turned in his report, after
20 that time?

21 MR. ARENSON: Yes.

22 MS. GURLAND: So other than the rebuttal report
23 of Kevin Johnson that came after, any other materials
24 other than Kevin Johnson's rebuttal report since your
25 report.

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1 A. You know, the rebuttal report of Kevin Johnson
2 and my report are the only two that I recall. I know
3 that I have been e-mailed other reports and, to be frank
4 with you, I didn't read them.
5 BY MR. ARENSON:
6 **Q. Okay. That's frank.**
7 **So you were e-mailed by Ms. Gurland other expert**
8 **reports?**
9 A. Yes. And he -- he has an Asian name.
10 **Q. Mr. Kim?**
11 A. Mr. Kim's report. I may have glanced through
12 that. I have a vague recollection of having glanced
13 through that.
14 **Q. Okay. Any other reports that you recall either**
15 **reading or glancing through?**
16 A. I received a report -- no. I know that I have
17 some other reports, but I know that I didn't read those,
18 so I'm not even going to mention them.
19 **Q. Okay. No deposition transcripts.**
20 A. No. As much as they would have been interesting
21 to read, I did not -- didn't even ask for them.
22 **Q. Sure. All right. So have we now covered all of**
23 **your conversations with Ms. Gurland up to today or are**
24 **there any others that I missed?**
25 **And when I say all conversations, I should ask a**

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1 **better question. Relevant to this case other than the**
2 **ones we have already talked about.**
3 A. The ones that were memorable.
4 **Q. The ones that you can recall.**
5 A. The ones that I can recall we have covered.
6 **Q. Okay.**
7 A. I'm not keeping anything from you that I can
8 remember.
9 **Q. Fair enough. That's all I can ask.**
10 **Other than Ms. Gurland, are there any other**
11 **lawyers in this case that you spoke with?**
12 A. I met with Dan Webb. Is Dan Webb involved in
13 this case?
14 **Q. Kind of.**
15 A. I met with him once very briefly, and he said,
16 good job, Scott, and I said thank you, sir, and that was
17 the extent of my conversation with him.
18 MS. GURLAND: Do you want a time frame so you
19 know if it is relevant to your reports or to the prior
20 reports?
21 A. (Continuing.) That happened prior to this --
22 that was the other case. That was the federal case.
23 BY MR. ARENSON:
24 **Q. So he told you good job in response to your work**
25 **in the criminal case.**

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1 A. Yes.
2 **Q. Okay.**
3 A. Maybe it was just thank you. I'm just saying he
4 said good job. I think maybe he said thank you. He was
5 smiling. He is a nice guy.
6 **Q. Okay. So you've talked to him and he said good**
7 **job or something similar.**
8 **Anyone else? Any other lawyers in this case**
9 **that you spoke with?**
10 A. About this report? About my work here or
11 something even if it was a different engagement?
12 **Q. Well, let's explore that.**
13 A. I don't know if that was a different engagement.
14 Somebody needed a copy of -- like I have all the EnCase
15 images for the -- for this case.
16 **Q. Okay.**
17 A. So somebody has requested a copy and that was
18 Duffy. I guess they have it -- they have a copy as well
19 and they need somebody that has EnCase knowledge to be
20 able to --
21 **Q. Who is Duffy?**
22 A. It is a law firm, I believe, that's involved
23 with another defendant possibly. I'm not sure.
24 **Q. Do you know who they are representing?**
25 A. No, not exactly.

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1 **Q. Do you know if it is Kristy Ross?**
2 A. You know what, it is Kristy Ross.
3 **Q. So do you know if they are representing her in**
4 **the criminal matter?**
5 A. No, I don't.
6 **Q. Okay. So you have spoken with attorneys at the**
7 **Duffy Law Firm. What did you talk about with them?**
8 A. Just exactly what I said, just about needing --
9 that they have EnCase images, and I'm assuming they are
10 the same EnCase images that I have. I'm not sure, but
11 they have EnCase images that they need access to.
12 **Q. Okay. And did you provide them access to the**
13 **EnCase images?**
14 A. No, not yet. That's a conversation that --
15 that's a conversation that we need to have, about how
16 that works. About how it's going to proceed and what
17 the deliverables are.
18 **Q. Okay. Do you know where the Duffy firm is**
19 **located? Are they here in Chicago?**
20 A. I believe so.
21 **Q. All right. Any other conversations with the**
22 **Duffy attorneys about anything relevant to this case?**
23 A. No, not at all.
24 **Q. Other than Duffy attorneys, Ms. Gurland, and**
25 **Mr. Webb, any other conversations with attorneys --**

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<p style="text-align: right;">129</p> <p>1 A. No.</p> <p>2 Q. -- about this case?</p> <p>3 A. No.</p> <p>4 Q. Have you ever spoken with Kristy Ross?</p> <p>5 A. No.</p> <p>6 Q. Any of the other defendants in this case?</p> <p>7 A. No.</p> <p>8 Q. Any of the other expert witnesses in this case?</p> <p>9 A. No. I believe I have had e-mail conversations</p> <p>10 with -- I think I e-mailed you once, didn't I?</p> <p>11 Q. If you did, I don't recall it, but I could be</p> <p>12 wrong. What did you e-mail me about?</p> <p>13 A. I don't remember. Something about not being</p> <p>14 able to access one of the EnCase images, and I think it</p> <p>15 was the thing with the partition.</p> <p>16 Q. Okay. Any other e-mails to any of the folks we</p> <p>17 have talked about in the last minute, attorneys,</p> <p>18 Ms. Ross -- when I say conversations, I should have been</p> <p>19 more clear. I meant to include e-mail conversations as</p> <p>20 well.</p> <p>21 Have you had -- that we haven't already talked</p> <p>22 about, have you had e-mail conversations or instant</p> <p>23 message conversations or any other type of conversations</p> <p>24 with -- and I will start over -- with any other attorney</p> <p>25 other than Ms. Gurland?</p>	<p style="text-align: right;">131</p> <p>1 question twice. I get a little confused as to maybe</p> <p>2 something changed in the definition.</p> <p>3 Q. I'm just trying to expand it to include e-mail</p> <p>4 and instant messages and any other form of conversation,</p> <p>5 but it sounds like the answer is still the same.</p> <p>6 A. No. I don't use IM, not much. It is bad enough</p> <p>7 people e-mail you all the time and want to know stuff.</p> <p>8 Now do I want it in the bottom corner of my screen too?</p> <p>9 No, thank you.</p> <p>10 Q. All right. So since your report was finished</p> <p>11 and you turned it in to Ms. Gurland, have you done any</p> <p>12 additional testing of software for this case?</p> <p>13 A. No.</p> <p>14 Q. All right.</p> <p>15 MR. ARENSON: At this point I think it makes</p> <p>16 sense to grab lunch, and when we get back, we'll dig</p> <p>17 into the exhibits. So off the record.</p> <p>18 (A lunch recess was taken.)</p> <p>19 MR. ARENSON: Okay. We are back on the record,</p> <p>20 and, Mr. Ellis, as you know, you are still under oath</p> <p>21 from this morning.</p> <p>22 BY MR. ARENSON:</p> <p>23 Q. We are going to turn to what we have marked as</p> <p>24 Exhibit 1, which is your report in this matter.</p> <p>25 A. Sure.</p>
<p style="text-align: right;">130</p> <p>1 A. No. Not to my knowledge, no. It has been --</p> <p>2 really it has been -- Ms. Gurland has been the focus.</p> <p>3 Q. Okay. No conversations of any type with Kristy</p> <p>4 Ross?</p> <p>5 A. No.</p> <p>6 Q. No conversations of any type with --</p> <p>7 A. You included e-mail. I did receive an</p> <p>8 engagement letter from her. I sent an engagement letter</p> <p>9 to Carolyn asking her to get it signed. I want a signed</p> <p>10 engagement letter. And Kristy Ross did e-mail that</p> <p>11 directly to me. But I guess conversation would mean it</p> <p>12 goes two ways, and I don't believe I responded other</p> <p>13 than maybe to say thank you.</p> <p>14 Q. Okay. And that's the only conversation you have</p> <p>15 had with her?</p> <p>16 A. That's it.</p> <p>17 Q. Any other conversation as we have defined it</p> <p>18 right now with any other expert witness?</p> <p>19 A. No.</p> <p>20 Q. And no other defendant either --</p> <p>21 A. No.</p> <p>22 Q. -- in this case?</p> <p>23 A. No.</p> <p>24 Q. Okay.</p> <p>25 A. I get confused a little if you ask me the same</p>	<p style="text-align: right;">132</p> <p>1 Q. Would you bring that out in front of you.</p> <p>2 Couple of just general questions about your</p> <p>3 report. Are there opinions contained in this report</p> <p>4 that you no longer want to offer in connection with this</p> <p>5 matter?</p> <p>6 A. At this moment, no.</p> <p>7 Q. At any moment up until now?</p> <p>8 A. At this moment I have no reservations about</p> <p>9 anything in this report.</p> <p>10 Q. Okay. Since you wrote this report, are there</p> <p>11 any new opinions that you have formulated regarding this</p> <p>12 matter?</p> <p>13 A. I wouldn't say that they were new.</p> <p>14 Q. Okay. In arriving at your opinions, did you</p> <p>15 come to any other opinions that you have not included in</p> <p>16 this report?</p> <p>17 A. No.</p> <p>18 Q. And does this report include all of the opinions</p> <p>19 you intend to offer at summary judgment or at trial?</p> <p>20 A. I wouldn't want to rule myself out from</p> <p>21 developing additional opinions about things and limit</p> <p>22 myself to just what's in this report. I may have other</p> <p>23 opinions about things that come up in the course of</p> <p>24 conversation and that are not in this report.</p> <p>25 Q. Here's the trick. We need to know what those</p>

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1 opinions are, so if there are other opinions that you
 2 have, we need to know about them.
 3 A. I don't have them yet.
 4 **Q. So standing here today, you have no opinions**
 5 **other than what's in your report.**
 6 A. I have opinions about the registry stuff that I
 7 think isn't as detailed in this report as it should have
 8 been.
 9 **Q. Okay.**
 10 A. Certainly what we discussed earlier about the
 11 way certain areas of the registry function, there may be
 12 additional areas of topics of conversation about the
 13 registry that I may need to do more research on and
 14 develop further opinions on. I feel that that's still
 15 an area that's not been 100-percent explored or
 16 understood.
 17 **Q. Okay. So you intend to do additional research**
 18 **on the registry questions and produce a supplemental**
 19 **report?**
 20 A. I may do that.
 21 **Q. Have you spoken with Ms. Gurland about this**
 22 **idea?**
 23 A. No, not yet. But there certainly may be areas
 24 that -- where -- that come to light this afternoon
 25 perhaps that my report isn't as solid as I would like it

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1 to be. That may happen.
 2 **Q. Okay.**
 3 A. In that case I would want to be able to submit
 4 additional information to you to assist you with
 5 understanding and clarifying the technology that's
 6 behind this.
 7 **Q. But as of right now and as of the beginning of**
 8 **when you wrote this report to right now, there are no**
 9 **other opinions that you are intending to offer that**
 10 **aren't in your report. And if there are, tell me what**
 11 **they are.**
 12 A. I don't think that I detailed in this report
 13 exactly how that section of the registry works, and I
 14 will do that for you this afternoon. Okay? And if
 15 that's what you qualify as an opinion --
 16 **Q. Okay. So we are going to get into the registry**
 17 **issues. Anything else that you are going to offer**
 18 **opinions on that aren't in your report?**
 19 A. Not that I can think of right now at this
 20 moment, no.
 21 **Q. Okay. Let's look at page 1 of your report,**
 22 **which is actually page 4 here because there is a cover**
 23 **letter.**
 24 A. Okay. I just -- there is one more thing, if I
 25 can clarify from earlier.

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1 **Q. Uh-huh.**
 2 A. When you were asking about conversations that I
 3 had with Carolyn, Carolyn asked me that question at
 4 lunch, are you sure there wasn't other stuff. And my
 5 memory does serve me that I did talk with her about like
 6 technical stuff with respect to the depositions that she
 7 would be taking.
 8 **Q. Okay. So you and Carolyn had a discussion just**
 9 **now at lunch?**
 10 A. Yes.
 11 **Q. And what did you guys talk about?**
 12 A. The sum of what I just said.
 13 **Q. So there were technical discussions that you had**
 14 **with Carolyn --**
 15 A. I recall technical -- discussions of a technical
 16 nature about depositions and questions that she would be
 17 asking her witnesses.
 18 **Q. Okay. And what were those discussions?**
 19 A. Like what does this mean, how does this work, I
 20 don't understand this technical term, like what is a hex
 21 editor, simple stuff like that. Nothing of real
 22 substance.
 23 **Q. Application highjacking? Is that one of the**
 24 **things you guys talked about?**
 25 A. No, I don't think so.

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1 **Q. Okay. On page 4, which is page 1 of your**
 2 **report, there are eight programs listed under**
 3 **"Assignment"; do you see that?**
 4 A. Yes.
 5 **Q. Did you test any software other than the eight**
 6 **programs listed here?**
 7 MS. GURLAND: For this report?
 8 MR. ARENSON: No.
 9 BY MR. ARENSON:
 10 **Q. Did you test any other software in connection**
 11 **with this case other than the eight programs listed in**
 12 **this report?**
 13 A. Before we had the materials I had tested a
 14 couple of pieces of software.
 15 **Q. Okay.**
 16 A. In connection with this case?
 17 **Q. Uh-huh.**
 18 A. No, I don't think so, not to my recollection at
 19 this moment. I know there was some confusion around
 20 which ones we were supposed to be looking at, and I do
 21 know at one point there was one that I had examined that
 22 had the wrong -- that was not a match, the hash value,
 23 and then I corrected that and we redid the work.
 24 **Q. And we talked about that before. It was**
 25 **WinAntivirus?**

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1 A. I think so.

2 **Q. And -- taking a bit of a detour -- you tested**
3 **WinAntivirus and how did you eventually conclude that**
4 **that wasn't the right one?**

5 A. Because we got the MD5 hash values from the
6 rebuttal report -- no. No. Maybe you provided the MD5
7 hashes. I don't know. I don't recall.

8 **Q. And what was the result of your testing on the**
9 **WinAntivirus program that you eventually discarded?**

10 A. It is the same. I had the same result from it
11 that I did from the other one. There was virtually no
12 difference to me in the way it operated.

13 **Q. So in your report you say, I was asked to test**
14 **various software, and then you say "these products**
15 **included," and you list a series of eight products. Are**
16 **there other products that are not listed here that you**
17 **tested?**

18 A. No.

19 **Q. When you say "these products included," you mean**
20 **these products including the following and none others.**

21 A. Yeah. And I'm being specific about MD5 hash.
22 Maybe we are bantering words a little bit. If we are
23 going by file names, yes. MD5 hash, no. File names,
24 yes.

25 **Q. Okay. Let's put that WinAntivirus, let's put**

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1 **that one aside for a moment and not talk about one.**

2 **Other than that outlier, does this represent the**
3 **whole body of research that you did on the programs in**
4 **connection with this case?**

5 A. Yes.

6 **Q. Okay. Now, we have talked about this**
7 **previously. You elected not to test three of the six**
8 **files that Kevin Johnson tested; right?**

9 A. That's right.

10 **Q. And that was based on Ms. Gurland's instruction**
11 **to you.**

12 A. That's correct.

13 **Q. So you have no basis to disagree with any of**
14 **Mr. Johnson's conclusions about these three programs.**
15 **And I will list them: AntivirusXP2008, ErrorClean, and**
16 **AntiMalwareGuard.**

17 A. I have basis to object to any report that I see
18 from a forensic examiner that's not based on solid
19 forensic technology or practices or methods or
20 procedures.

21 **Q. So you did not test the programs.**

22 A. I did not test the programs.

23 **Q. But you feel you have an objection to**
24 **Mr. Johnson's testing.**

25 A. I question the processes that he used in his --

1 I would reserve the right to look at those items, and I
2 think I could certainly question him.

3 **Q. That would be great. Would you test those**
4 **items? Are you willing to do so?**

5 A. Certainly I'm willing to do so provided that my
6 fees and time are compensated.

7 **Q. Well, I mean, it is part --**

8 MS. GURLAND: Are you giving my expert an
9 assignment? I'm not sure this is how this goes.

10 MR. ARENSON: Well, he just said he is willing
11 to test them, and I think they are certainly relevant to
12 this case.

13 MS. GURLAND: Are you going to employ him as an
14 expert? Don't you see that as a conflict?

15 MR. ARENSON: I don't think I can employ him as
16 an expert, but these files are directly relevant to the
17 case and you have instructed him not test them and --

18 MS. GURLAND: I haven't instructed him not to
19 test them and that's not the testimony. He can test
20 whatever he wants to test.

21 MR. ARENSON: Well, let's let him answer the
22 question then.

23 BY MR. ARENSON:

24 **Q. Mr. Ellis, if you can test anything you would**
25 **like to test, would you like to test these three files**

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1 **that you didn't test before that Kevin Johnson**
2 **specifically did test?**

3 A. If counsel directs me to do so and deems it
4 relevant to the case and it is part of my examination --
5 are you asking me if I'm curious?

6 **Q. Yes.**

7 A. I certainly am not curious about creating more
8 work for myself.

9 **Q. Did you see the results that Mr. Johnson got**
10 **when he tested them?**

11 A. Yes. I reviewed this.

12 **Q. And doesn't that make you curious about what**
13 **these files did?**

14 A. Well, my wife would tell you that everything
15 makes me curious.

16 **Q. Fair enough.**

17 A. So I have a great deal of curiosity. I have
18 more than enough to go around so, yes, I'm certainly --

19 **Q. But you won't test these files unless**
20 **Ms. Gurland let's you.**

21 A. It is not a matter of her letting me. I'm a
22 retained expert, and if I felt there was a need to test
23 them, I would test them, and that's certainly a
24 discussion that we may have.

25 **Q. Okay. Let's talk about why you currently don't**

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1 think there is a need to test these files.
2 A. I'm currently under the impression that they are
3 not IMI products.
4 Q. And what's that based upon?
5 A. That's based on direction from counsel.
6 Q. Okay. So Ms. Gurland has told you that they are
7 not IMI files and hasn't provided you any information as
8 to why that might be, has she?
9 A. Not to my recollection, no.
10 Q. Okay. So getting back to your objections about
11 Mr. Johnson's testing, you -- you have an objection to
12 Mr. Johnson's testing of these three files; is that
13 correct?
14 A. No, I don't have any objection to him testing
15 them. I have reservations about the chain of custody.
16 I have a -- that's what I really don't understand and
17 that's what I have been asking questions about, is where
18 is the chain of custody? How do I know that these
19 files -- how do I know that the files I did test are IMI
20 files? How do I know that they came from an IMI server?
21 Q. That's a bit of a different question. I'm not
22 asking you to establish the chain of custody. You've
23 already told us that you don't know. You don't know
24 where these files came from or what the source was;
25 right?

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1 A. Right.
2 Q. So that's really not what I'm asking you. I'm
3 asking you the programs themselves --
4 A. Right.
5 Q. -- which you haven't tested but Mr. Johnson has,
6 do you have objections to the methodology that
7 Mr. Johnson used to test those programs?
8 MS. GURLAND: Define methodology.
9 MR. ARENSON: No.
10 A. I guess the one question I have -- and then I
11 guess we can then answer the question of methodology --
12 the one question I have is that it appears that he says
13 he ran PCTurboProSetupFree and that's not in my list and
14 that MD5 hash that he lists here is not in the list of
15 files I have tested.
16 And then he says that -- he says that this is --
17 and I quote, This is yet another free version of the
18 software viewed in comparison to the paid versions Kim
19 and Ellis tested.
20 I don't understand where he got the impression
21 that I tested the software. I did not.
22 BY MR. ARENSON:
23 Q. I can explain it to you but I'm not sure it is
24 really relevant. He is testing the free software and
25 you tested the paid versions of the software. And we'll

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1 talk about that there are significant distinctions
2 between the free and the paid versions --
3 A. I don't think I tested a free version of this
4 PCTurboProSetupFree. I don't see that in my list of
5 titles.
6 Q. You didn't. But what you did do was select the
7 paid versions of the software to test in almost every
8 case, and what Mr. Johnson did was test the free version
9 of the software. That's the distinction he is drawing
10 there.
11 But that's not relevant to my question, which is
12 do you have objections to Mr. Johnson's methodology of
13 testing these programs which you haven't tested?
14 A. I think this speaks to his methodology where he
15 doesn't even know what I tested and he says that I
16 tested it.
17 Q. He doesn't say that.
18 A. He says that's a version of WinFixer. I don't
19 know. It is confusing.
20 Q. So you don't -- that's really --
21 A. That was a different -- I was on the wrong page.
22 He is talking about this is yet another free version of
23 the software viewed in comparison to the paid version --
24 I'm assuming -- of the software that Kim and Ellis
25 tested.

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1 I did not test this. He did not know that.
2 That's a methodology issue.
3 Q. I think your assumption is the problem, but
4 let's put that aside because at the end of day it is
5 going to be a nonissue.
6 Let's talk about other objections you have to
7 the methodology Mr. Johnson used and is described in
8 this report.
9 A. He doesn't talk about actually using any sort of
10 tools to examine what the software is actually doing.
11 It is kind of like a mechanic listening to an engine and
12 saying, well, it is knocking so maybe the spark plug's
13 loose. You have to lift up the hood and take a look and
14 see.
15 Q. Really. So let's talk -- there is two Johnson
16 reports. Let's take a look at the one that you are
17 looking at to start with. So let's look at PCTurboPro.
18 You see that? Right there.
19 Now, Mr. Johnson has compared the detections by
20 PCTurboPro to the tools that Windows provides, correct,
21 and they don't even come close to matching; right?
22 A. Oh, like -- sure.
23 Q. Okay. So when you say Mr. Johnson didn't use
24 any tools, that wasn't right.
25 A. He opened up Windows Task Manager and then he

<p style="text-align: right;">145</p> <p>1 looked at -- you know, this could have been -- I haven't 2 tested this software. I can't speak to it. All I can 3 say is he is not showing me a perfmion trace of what the 4 CPU usage was over a period of time. The task manager 5 tells us what the CPU usage is right now. 6 If he ran perfmion and had a data collector 7 running on the CPU itself and provided that, that would 8 be forensics. 9 Q. Why don't you take a -- 10 A. Popping up the Windows Task Manager and showing 11 me what the CPU is, that's not forensics. 12 Q. Take a look at the next one. The hard drive 13 space, same page -- 14 A. Sure. 15 Q. Explain to me why that's not a valid forensic 16 analysis. 17 A. The hard drive space is going to show the usage 18 of space -- this is not a forensic analysis of the hard 19 drive. A forensic analysis of the hard drive would be 20 an EnCase view of the disk usage and it would show you 21 what the actual usage was. This could certainly -- 22 Q. Could what? 23 A. I'm sorry? 24 Q. You were going to say something and then you cut 25 yourself off. What objection do you have to the disk</p>	<p style="text-align: right;">147</p> <p>1 say are required in order to convince you of the results 2 that you see right in front of you? 3 A. Of course. I would be willing to -- I was 4 willing to do those tests for the software that I have 5 already examined. 6 Q. So the answer is yes. 7 A. The answer is that I'm not going to commit to do 8 anything for you. 9 Q. Okay. 10 A. But, yes, if I were asked, I would certainly be 11 willing to do whatever I was asked to do. 12 Q. I'm not sure that's an answer at all. 13 So what other objections to Mr. Johnson's 14 methodology do you have? And why don't we -- we can 15 look at his initial report as well, because there are 16 other tests here that we haven't discussed. 17 So why don't we take a look at AntivirusXP2008, 18 this page. Now, on a clean VMWare image AntivirusXP2008 19 detected 2,794 threats. Can you explain that? 20 A. No. 21 Q. Do you have any critiques of Mr. Johnson's 22 methodology in opening that program and running it on a 23 clean VM machine? 24 A. Again this is software that I haven't examined. 25 This is not -- his methodology is not my methodology,</p>
<p style="text-align: right;">146</p> <p>1 space that Windows is displaying versus the greatly 2 inflated number that PCTurboPro is displaying? 3 A. The answer is that I have not examined this 4 myself. 5 Q. And that's exactly my point, Mr. Ellis. You 6 haven't examined these files yourself; right? 7 A. But there is not enough here to convince me of 8 what's going on. 9 Q. And are you willing to undertake the tests? 10 MS. GURLAND: I'm going to object to this and 11 ask him not to answer it, because I don't think that it 12 is appropriate for you to ask my expert to do something. 13 MR. ARENSON: I think it is entirely 14 inappropriate for you to instruct your expert not to 15 answer a question. 16 BY MR. ARENSON: 17 Q. Mr. Ellis, I would encourage you to answer the 18 question but ultimately it is your decision. 19 Are you willing to undertake the tests that you 20 say are demanded in order to know the answers to the 21 questions -- 22 MS. GURLAND: That misstates what he said. 23 BY MR. ARENSON: 24 Q. You can go ahead and answer. 25 Are you willing to undertake the tests that you</p>	<p style="text-align: right;">148</p> <p>1 and to the extent where I would have been running a 2 trace to find out exactly what the software did and what 3 it was purporting to scan, it is not -- 4 I can answer your question that it would not be 5 normal to find 2,794 viruses on a brand-new computer, 6 but I would want to make sure that I was the one that -- 7 that I had control of that computer, because certainly I 8 have plugged brand-new machines, XP machines, into the 9 Internet and had them become massively infected within 10 moments. And I would want to make sure that that didn't 11 happen in this case, and I would just want to know that 12 with forensic certainty. 13 Q. Understood. 14 A. And I don't get that from his report. 15 Q. You want to verify Mr. Johnson's conclusions 16 yourself. 17 A. That would be -- if you are going to ask me 18 about them, then yes. 19 Q. Okay. But what I'm asking you, and where we 20 started with this whole path, was that you haven't 21 tested AntivirusXP2008, ErrorClean, or AntiMalwareGuard; 22 is that correct? 23 A. That's correct. 24 Q. So what basis do you have to object to the 25 findings in Mr. Johnson's report?</p>

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1 A. He doesn't -- he doesn't -- I think I have
 2 already answered this question. He doesn't use the same
 3 sort of methodology that a forensic examiner would use
 4 with the analysis of looking under the hood to see
 5 what's going on and then laying it out in a nice
 6 easy-to-read format.

7 Basically he is saying the sky is blue and I'm
 8 saying are you looking through blue glass. I don't
 9 know, because I don't know. I didn't do the testing on
 10 that piece of software and his tests are not that
 11 comprehensive.

12 **Q. Okay. So based on the testing that he did --**
 13 **let's just focus on what he did -- what is your**
 14 **objection to opening up AntivirusXP2008 on a clean**
 15 **VMWare image not connected to the Internet and then**
 16 **finding that there were 2,794 infections on that**
 17 **computer?**

18 A. I would have no objection to that as an initial
 19 finding, yeah.

20 **Q. Okay. And if you were told that he ran the**
 21 **exact same process for ErrorClean and AntiMalwareGuard**
 22 **and there were fake detections for both of those, large**
 23 **number of detections on a clean computer, what would**
 24 **your objections be to those tests?**

25 A. I believe that the ErrorClean is more about

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1 problems with Windows as it is out of the box, so that
 2 would be probable that it would find issues with the
 3 registry and with files in Windows. I mean, the Windows
 4 themselves, they -- Microsoft will acknowledge that
 5 there is bugs and things that happen with their software
 6 when it gets released. Their software is not clean
 7 coming out of the box. I've reported three bugs myself
 8 this year, and I'm working with Microsoft technologists
 9 on fixing those bugs. I've identified new bugs myself.

10 **Q. Right. So you haven't tested ErrorClean.**

11 A. Does he have an MD5 hash listed here for it
 12 anywhere?

13 **Q. Maybe you could look at the list of the files --**

14 A. I don't believe he ever provided the MD5 hash
 15 for the ErrorClean so I'm not sure how I would have.

16 **Q. Maybe you could look at the files that you**
 17 **tested and see if any of them are ErrorClean?**

18 A. How can I tell that without an MD5 hash?

19 **Q. Because he provided you the file name.**

20 A. So if something has a file name -- just because
 21 two files have the same file name does not make them the
 22 same file.

23 **Q. I think that's understandable. You know the**
 24 **files you tested. Can you tell me if any of those files**
 25 **are ErrorClean?**

1 A. No, I can't.

2 **Q. Really?**

3 A. Does he have screen shots of ErrorClean? He
 4 might have screen shots and I can look at his screen
 5 shots.

6 **Q. So you can't tell looking at the files you**
 7 **tested which programs you tested. You don't know.**

8 A. Yeah, I can.

9 **Q. Then tell me, did you test ErrorClean?**

10 MS. GURLAND: Are you asking whether or not --
 11 did -- is the question did Mr. Ellis test ErrorClean?
 12 Is that the question?

13 BY MR. ARENSON:

14 **Q. The question is does your report indicate that**
 15 **you tested ErrorClean? It is right there in front of**
 16 **you.**

17 A. And my answer is that he doesn't list the MD5
 18 hash, so I don't know -- it could have a different name.

19 **Q. So you are not sure which files you tested.**

20 A. I'm sure the -- which files I tested. I'm not
 21 sure which files he tested.

22 **Q. I understand. So I'm telling you that he tested**
 23 **ErrorClean, and you are not able to tell me whether you**
 24 **tested ErrorClean or not.**

25 A. Could ErrorClean be ErrorPatrol? Maybe that's

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1 what that file was called. I need screen shots or more
 2 information. There is nothing here. This report is
 3 pathetic. It is small. It is lacking so much
 4 information. It is such an opportunity to have a wealth
 5 of information about what's going on and it is not
 6 there. It is like five page.

7 **Q. So you don't know whether you tested ErrorClean**
 8 **or not.**

9 MS. GURLAND: Whether you tested ErrorClean?

10 A. I did not test this piece of software that he
 11 has, to my knowledge. I don't know if I did or not. If
 12 one of these was called ErrorClean --

13 BY MR. ARENSON:

14 **Q. Can't you read?**

15 A. He doesn't provide a screen shot. This is just
 16 a file name.

17 **Q. Mr. Ellis, do you know which files you tested?**

18 A. Sir, these are file names that he lists here.
 19 We have observed already that some of these file names
 20 are sometimes different. Mr. Johnson identifies that
 21 and highlights that and illustrates that in his report.

22 **Q. So you don't know which files you tested.**

23 A. I do know which files I tested because they are
 24 listed right here.

25 **Q. And were any of them ErrorClean?**

<p style="text-align: right;">153</p> <p>1 A. I believe I have already answered the question 2 that you are asking me. 3 Q. I'm sure you haven't. 4 A. I'm trying to explain it to you. In forensics 5 we have what's called an MD5 hash that identifies what a 6 file is. That's how we talk to each other. That's now 7 forensic experts talk to each other with the language of 8 MD5 hashes. 9 If I download a file from the Internet to 10 install it on my computer, oftentimes on that site there 11 will be an MD5 hash that says this is the genuine 12 article. This is what says that this software is this 13 software. 14 Anybody else can fabricate, create, replicate a 15 piece of software. It is done. It is done often. 16 Software forgery is a huge issue. Whether or not it got 17 called ErrorClean, if he had included screen shots, I 18 may be able to identify, yes, it looks similar to 19 perhaps ErrorPatrol. I just don't know. There may be 20 screen shots here and I'm not seeing them. 21 Q. I'll tell you what -- 22 A. Let's look through -- this report may have 23 screen shots in it, the expert report of Kevin Johnson. 24 Q. Before you do that though, I'm curious whether 25 you know whether you tested ErrorClean or not?</p>	<p style="text-align: right;">155</p> <p>1 Q. Why don't we talk about those differences. 2 A. Okay. 3 Q. What were they? And we can start, if you would 4 like, with your -- let's go to ErrorPatrol, since you 5 tested both the free and paid version of that. That's 6 on page 14 of your report. 7 A. Okay. 8 Q. Now, in your conclusion here on page 14 you say: 9 "My tests of the free version revealed similar 10 functionality to the paid version with the exception 11 that the free version did not perform the repair." 12 A. That's right. It would ask you to buy it. It 13 would have a window that popped up that said your 14 system -- and it would look very similar to the screen 15 that listed the problems, and it would, you know, 16 basically say warning, if you want to fix this, you have 17 to click here. 18 Q. So that's one difference between the free and 19 paid version. 20 A. Yeah. 21 Q. Any others that you recall? 22 A. Not that I recall off the top of my head, no. 23 Q. Okay. Were you aware when you were doing your 24 testing that five of the eight files you tested were the 25 paid versions of the software and not the free version?</p>
<p style="text-align: right;">154</p> <p>1 Presumably you opened these files up and looked at the 2 names, right, when you were testing them? 3 Wait, before you go through that. I would like 4 you to answer this question. Do you know whether you 5 tested ErrorClean or not? 6 A. I can't conclusively say from a file name what 7 the software is called. 8 Q. That's fine. Let me represent to you that 9 ErrorClean is, when you open it, named ErrorClean. 10 A. It says ErrorClean at the top of the thing 11 there? 12 Q. The program name is ErrorClean. That's how it 13 is batched. 14 Looking at the files that you tested, can you 15 tell me whether you tested ErrorClean? 16 A. None of them had ErrorClean on the slash screen. 17 Q. Wonderful. That's all we need to know. So you 18 didn't test ErrorClean. 19 A. I did not test ErrorClean. 20 Q. Thank you. Right. 21 A. I just wanted to be clear. 22 Q. When you were testing the executables that you 23 did test, did you notice any difference between the paid 24 and the free versions? 25 A. Yes.</p>	<p style="text-align: right;">156</p> <p>1 A. Yeah. Yes, I was aware of that. 2 Q. So you knew when you were testing that five of 3 the eight files you tested were the paid versions. 4 A. Yes. 5 Q. When you wrote your report, had you read the 6 FTC's complaint? 7 A. I'm not sure -- I'm not sure that I ever did 8 read the FTC complaint, to be frank. I would have 9 listed -- yeah, I probably would have listed it if I had 10 spent a lot of time on it. I don't recall. 11 Q. Okay. 12 A. I may have read the complaint. I don't recall. 13 Q. You just don't know. 14 A. I just don't remember. 15 Q. What is your understanding of the FTC's 16 allegations against the defendants? 17 A. My understanding is that they were forcibly 18 downloading the software to people's computers and 19 forcibly installing it and -- or that they were just -- 20 had popups that would ask people to run a scan and 21 download it. 22 Q. Okay. Let me give you some more information. 23 The FTC has charged the defendants with 24 misleading consumers in order to trick them into 25 purchasing software, so making misleading statements in</p>

<p>157</p> <p>1 order to trick consumers into purchasing software. 2 Did you know that previous to me telling you? 3 A. Yes. You said it very succinctly. 4 Q. Okay. So you would agree with me that if we are 5 examining whether the defendants misled consumers in 6 order to purchase software, we need to look at the 7 representations the defendants made prior to purchase; 8 right? 9 A. Yes. 10 Q. So by testing five of the paid versions, what 11 relevance does that have to the central allegation in 12 this case, that the defendants made false 13 representations to induce consumers into purchasing the 14 software? 15 MS. GURLAND: You are asking for what the legal 16 relevance is? 17 MR. ARENSON: I'm asking for his opinion. 18 MS. GURLAND: His opinion about the -- 19 MR. ARENSON: The relevance to the case of his 20 analysis. 21 MS. GURLAND: So your opinion about the legal 22 case and the court case and the relevance in the court 23 case. So you can offer a legal opinion like a lawyer, 24 if you would like to. 25 MR. ARENSON: That's a completely inappropriate</p>	<p>159</p> <p>1 Q. Mr. Ellis, you can go ahead and answer. 2 A. I think I can offer a technical foundation for 3 why I would do that that has nothing to do with the 4 legal -- 5 Q. Okay. 6 A. -- stuff that you guys are talking about, and 7 the answer would be if somebody purports to sell me a 8 piece of software that does something and then I buy it, 9 I would want to know if the software actually could do 10 what the person said it could do. 11 So if I buy -- on-line I buy a virus scanning 12 software because they did an on-line scan that says my 13 computer is infected and then I download a piece of 14 software that does nothing, that is a problem. That is 15 a big problem. 16 So if, for example, I had not tested these paid 17 versions and then we had been sitting here and you said 18 to me, Mr. Ellis, you did not test these paid versions, 19 why not? Mr. Ellis, Kevin Johnson says these paid 20 versions do nothing. I would be in a bit of a 21 predicament right now. 22 On the other hand, if somebody says that a piece 23 of software does something and then it actually does 24 it -- if it says it can find viruses and then it 25 actually is able to find viruses and remove them, it is</p>
<p>158</p> <p>1 objection. 2 BY MR. ARENSON: 3 Q. Mr. Ellis, you did the testing here; right? 4 A. I believe that the -- my understanding -- 5 Q. We have to fix Ms. Gurland's speaking objection 6 first. Let's get that fixed. 7 So you did the testing here; right? 8 A. Yes. 9 Q. And presumably you believe your testing had some 10 relevance to this case. 11 A. Yes. 12 Q. So my question to you is what relevance does 13 testing the paid version of the software have to this 14 case which revolves around the defendants making 15 misrepresentations to consumers in order to induce them 16 to buy the software? 17 MS. GURLAND: You want his legal opinion? 18 MR. ARENSON: Carolyn, please do not enter that 19 same speaking objection again. 20 MS. GURLAND: I'm going to make an objection if 21 I think it is proper. If you are asking him to render 22 an opinion about the legal case, I just want that to be 23 clear that that's what you are asking for. 24 MR. ARENSON: My statement stands. 25 BY MR. ARENSON:</p>	<p>160</p> <p>1 legitimate software in my opinion. 2 Q. So software that misrepresents the security 3 status of your computer but at the end of the day 4 actually functions, that's legitimate software. 5 A. I can't speak to that part. I think that I can 6 speak to the software that I tested, that it did not 7 misrepresent the condition of my computer. 8 Q. Really? 9 A. In my report I don't believe that there is -- 10 there was any misrepresentation. 11 Q. Okay. 12 A. It said that there were registry problems and 13 there were registry problems. That registry key is one 14 that in Windows 7 doesn't contain all of those files 15 anymore, doesn't contain all of those references. 16 That's been fixed in 7 so -- but when you go 17 back to the Kevin Johnson report, that's a different 18 area altogether. 19 Q. So if we are focusing on the representations 20 made to consumers in order to induce them to purchase 21 the products, would you agree with me that testing the 22 paid versions, the postpurchase versions of the 23 software, wouldn't shed any light on what 24 representations were made to the consumers by the 25 defendants prior to purchase? Would you agree with that</p>

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1 statement?

2 A. Can you break that down?

3 Q. Sure. We are focusing on the representations
4 made to consumers in order to induce them to purchase
5 the product.

6 A. Okay.

7 Q. That's the first part.

8 Now, you have tested in five out of eight cases
9 the software that consumers received after they made
10 their purchase. And my question to you is, if we are
11 focusing on what representations were made to consumers
12 prior to purchase, we need to test the free versions of
13 the software, not the paid versus; right?

14 A. I think you need to test both.

15 Q. Okay. That's fair. So we need to test the free
16 and the paid.

17 A. Right.

18 Q. Okay. And in five out of eight cases you only
19 tested the paid versions; is that right?

20 A. I believe I had tested -- I definitely tested
21 two of them, three of them. Yeah, without looking at
22 the screen shots in front of me, I believe that I
23 tested -- can I see a pen?

24 MS. GURLAND: You can look at the body of your
25 report too if it helps you.

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1 THE WITNESS: Okay. Yeah.

2 A. Yeah. So it looks like DriveCleaner, WinFixer,
3 and WinAntivirus2006 I did not test the free version,
4 but in ErrorPatrolSetup, PerformanceOptimizer, and
5 WinAntivirus I did.

6 BY MR. ARENSEN:

7 Q. Okay. I think that's what I said. There were
8 three files where you tested the free version and five
9 that you didn't. Is that right?

10 I mean, do you want to go through them and we'll
11 work it out? Let's go through each one and we'll talk
12 about whether it's paid or free.

13 DriveCleaner2007PaidSetup, was that a paid
14 program or free program?

15 A. My recollection is that was a paid setup.

16 Q. ErrorPatrolSetup.Exe, paid or free?

17 A. That was paid. It says right there.

18 Q. WinAntispyware --

19 MS. GURLAND: Are you not going to read the one
20 underneath it that says he tested the free version of
21 the exact same thing?

22 MR. ARENSEN: Carolyn, I'll tell you what, I
23 will ask the questions and then you can ask questions at
24 the end, if you'd like.

25 ///

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1 BY MR. ARENSEN:

2 Q. WinAntispyware2006Setup, paid or free, or do you
3 not know?

4 A. The ProSetup, I believe that was --

5 Q. I didn't ask about that.

6 WinAntispyware2006Setup, paid or free?

7 A. I believe that was paid.

8 Q. WinAntivirus2006ProSetup, paid or free?

9 A. That was free -- I'm sorry, that was the paid.

10 Q. And WinFixer2006PaidSetup.

11 A. That was paid.

12 Q. Okay. So the only three free files you tested
13 would be ErrorPatrolFreeSetup; right?

14 A. Right.

15 Q. WinAntivirus2005ProScannerSetup.

16 A. Right.

17 Q. And PerformanceOptimizerFreeSetup.

18 A. I believe that's correct.

19 Q. Okay. Glad we ran that down.

20 So, again, you told me that it would be
21 important to test both the free and the paid version of
22 the software if we are evaluating the defendants'
23 representations to consumers prior to purchase; is that
24 correct?

25 A. I had them -- yeah. I'm not sure that I had

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1 them available to me. I would have to go back and look
2 and see if those were available to me. There was a lot
3 of issues of availability.

4 Q. Isn't it the case that Ms. Gurland told you
5 which ones to test?

6 A. Yes, that's true, but certainly I would have had
7 discussions about testing. I would have had those
8 discussions with her. I don't recall.

9 Q. Were there files that you asked to test that
10 Ms. Gurland said no?

11 A. No. No.

12 Q. So you didn't have any discussions with
13 Ms. Gurland about testing.

14 A. It may have been -- I'm not going to talk about
15 what may have been.

16 Q. Okay. So we have established that you haven't
17 tested the free versions of all the paid versions we
18 just talked about, with the one exception of
19 ErrorPatrol, which you did test both the paid and the
20 free; right?

21 A. Right.

22 MS. GURLAND: That's misstates the testimony.

23 MR. ARENSEN: He just said right and he is
24 right.

25 A. (Continuing.) Can you rephrase?

<p>165</p> <p>1 BY MR. ARENSON: 2 Q. The testimony's fine. 3 Why would it be important to test both the paid 4 and the free version in order to determine what 5 representations the defendants made to consumers 6 prepurchase? 7 A. Well, I think it would be important to look at 8 the free version to see what functionality it was 9 purporting to do. 10 Q. Uh-huh. What about the paid version? You said 11 you had to test the paid version too. 12 A. As to whether it could execute the functionality 13 that it said it could, and the paid versions list the 14 same things that they say that they will do so -- 15 Q. But -- 16 A. -- I think it is more critical to be able to 17 test the paid versions and say can the software perform, 18 can it work, can it say what it says it will do. 19 Q. Let me give you a hypothetical: If the 20 defendants misrepresented the security status of a 21 computer and then subsequently sold a piece of software 22 that did function to remove viruses, let's say, do you 23 have any issues with that type of marketing? 24 A. That would be dependent on -- yeah, certainly. 25 But that would be dependent on how it was being</p>	<p>167</p> <p>1 third-party website, was it an affiliate, was it the 2 software itself. 3 Q. The representations made prepurchase. 4 A. But prepurchase, what was making the 5 representations? Was it a third-party vendor making the 6 representations? Was it a reseller of the software 7 making these representations? I don't know. 8 Q. So -- and maybe we are just not going to get an 9 answer, but my original question, which we'll try one 10 more time, is if this case is about the representations 11 made to consumers prepurchase, then what is the 12 relevance of the software provided postpurchase? 13 A. Whether or not it can meet up to those 14 representations. 15 Q. All right. That's actually a fair point. 16 So if -- do you think it is important whether 17 the representations made prepurchase are accurate or is 18 that not an important consideration? 19 A. I think it is important to know who was making 20 the representations and how they were being made and 21 delivered. And I don't know in the cases we are talking 22 about whether or not it is the software that was making 23 the representations. I would have to look at the 24 software and that I would do and that I will do. 25 Q. In your personal view, do you think it is okay</p>
<p>166</p> <p>1 portrayed, who was doing the portrayal. Certainly there 2 has been lots of cases where software's been downloaded 3 on the Internet, bought, and installed, only to find out 4 that somebody had used their methodology to tell you 5 what was wrong, why you have to buy this product. 6 Q. So if we agree -- and I will represent to you 7 that this is true -- that this case is about the 8 defendants' representations made prepurchase, okay -- 9 and I'm going to represent to you that that's what the 10 FTC is alleging here, that the defendants misrepresented 11 prepurchase; okay? 12 A. Okay. 13 Q. Now, if we assume that that's true, isn't it 14 important to test the free versions versus the paid 15 versions? 16 A. I don't know that it was represented to me that 17 the free versions misrepresented -- 18 Q. I'm not sure what that has to do with the 19 question. 20 A. Well, you asked me if the -- if they 21 misrepresented what the software does, and there are so 22 many different mediums whereby any sort of 23 representation about software could be made, I would 24 want to see -- I would want to see more exploration of 25 that. Like was it done on a website, was it a</p>	<p>168</p> <p>1 if the defendants misrepresented the security status of 2 a computer and then sold a product that ultimately 3 functioned? 4 A. No, I don't think that's okay. 5 Q. Okay. Let's talk about ErrorPatrol. Now, I 6 think you told me -- and correct me if I'm wrong -- that 7 the difference between the ErrorPatrolFree and the 8 ErrorPatrolPaid, both of which you tested, was that 9 ErrorPatrolPaid actually would repair the, quote, end 10 quote, errors, whereas ErrorPatrolFree would prompt you 11 to register the program; is that correct? 12 A. That's correct. 13 Q. Any other differences that you noticed between 14 the two programs that you can recall? 15 A. No. 16 Q. Okay. I'm going to mark as Exhibit 2 screen 17 shots from ErrorPatrolFree and ErrorPatrolPaid. 18 (Ellis Exhibit Number 2, ErrorPatrol Screen 19 Shots, was marked for identification.) 20 MS. GURLAND: Screen shots taken by whom and 21 when? 22 MR. ARENSON: That's actually not relevant to 23 the question, Carolyn, but I will tell you. These are 24 screen shots taken by me in preparation for this 25 deposition.</p>

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<p>1 MS. GURLAND: That's relevant. 2 MR. ARENSON: I don't see how. 3 BY MR. ARENSON: 4 Q. So we'll look at the first image, and you can 5 tell the difference between the free and the paid 6 version by the top of the menu bar where it says "Not 7 Registered"; do you see that? 8 A. Yes. 9 Q. Did you encounter that when you were testing the 10 software? 11 A. I believe so. 12 Q. Okay. And is that a way to distinguish between 13 the free and the paid versions? 14 A. Yeah. 15 Q. Now, if you look at the first two pages of the 16 screen shot, you will see severe errors detected on the 17 first page; do you see that? 18 A. Severe systems threats such as -- yes. 19 Q. Actually, if you look up above on the menu bar, 20 286 severe errors. 21 A. Sure. Okay. 22 Q. And then onto page 3 -- are you there? 23 A. Yes. 24 Q. So same number of errors, quote, end quote, 25 "detected," but I will represent to that you this</p>	<p>1 Now, that message didn't exist in the paid 2 version. 3 A. Well, the message here is specifically to say 4 you need to register ErrorPatrol to fix these errors. 5 So clearly in the next one you have done so, so why 6 would I tell you that you need to register it to fix 7 these errors when you have already done that? 8 And this is just what they were showing you. 9 They were breaking this stuff out, the 248 invalid items 10 found and the 38 invalid items found, they were breaking 11 that out into a popup that said here's what's going on. 12 Q. So you didn't think it was significant that the 13 free version of ErrorPatrol describes the errors as, 14 quote, end quote, "severe system threats," and then 15 provides four -- a parade of horrors as to what could 16 happen as a result of these system threats. 17 MS. GURLAND: Objection as to the 18 mischaracterization by counsel as to what he believe 19 that it is, a parade of horrors. It says what it 20 says. 21 BY MR. ARENSON: 22 Q. And then the paid version doesn't include that 23 list at all, and you didn't think that was worth 24 mentioning in your report? 25 Or I will ask you the question: Did the paid</p>
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<p>1 warning message doesn't appear in the paid version. 2 A. Okay. 3 MS. GURLAND: Are you -- are you going to be a 4 witness? 5 BY MR. ARENSON: 6 Q. Did you encounter that in your testing? 7 A. Yes. Yeah. I encountered that same -- then you 8 click repair and it would say you need to buy the 9 software, right. 10 Q. So that's kind of a difference between the paid 11 and the free version; right? 12 A. That was the difference that I mentioned 13 earlier, that it would prompt you. I'm sorry if I 14 wasn't as clear. 15 Q. Well, I think it is a pretty large oversight but 16 let's focus on it. 17 A. I don't think so at all. 18 Q. You didn't say anything in your report about 19 this error message, which says -- and I will read it for 20 the record: "Error Patrol has detected 286 severe 21 system threats on your computer. The errors found on 22 your computer are very likely to create further problems 23 if not fixed immediately, such as lost documents and 24 profile settings, physical data loss, system not 25 starting up, system slowdowns, crashes, and freezes."</p>	<p>1 version say anything about severe system threats? 2 A. The assumption is that you already know that 3 once something is in here, you know the purpose of the 4 software. The purpose of the software is to detect what 5 may be severe system threats. 6 Q. Really? How would a consumer know that? 7 A. Because they have seen this popup already and 8 purchased the software and downloaded it and installed 9 it and hopefully they remember why they installed the 10 software. 11 Q. So the reason you didn't think this was 12 important is because the consumer already would have 13 seen this when they got the free version and the paid 14 version didn't need to repeat the message. 15 A. This would have been in the screen shots that 16 were included in the materials that I used. 17 Q. Those weren't part of your report, sir, so I 18 don't have those with me. What we are talking about now 19 is the screen shot in front of you. 20 Now, is the reason you decided not to discuss 21 this difference between the paid and the free version is 22 that you assumed consumers would have already seen this 23 message when they got the paid version; is that -- do I 24 understand your testimony correctly? 25 A. That would be the difference that I was talking</p>

<p>173</p> <p>1 about when I said the difference -- when I was talking 2 about difference, I was talking about functionality in 3 the way that the software works and doesn't work and 4 what it is doing. 5 So far as the dialogue that happens, I did 6 mention that one difference was that the not-registered 7 version would pop up a popup telling you that you needed 8 to buy the software. That's what I was talking about. 9 That's the difference and I did mention that, and that 10 was the difference that I was talking about. And it is 11 right here. So I'm not sure where you are going with 12 that but that's my answer. 13 Q. Okay. So you don't view this as a significant 14 difference between the programs. This is just a popup 15 dialogue. 16 A. This is the difference that I mentioned in my 17 report. Didn't I not mention that the only difference 18 between the two softwares was that one requested that 19 you buy it? And this is the request to purchase. 20 I didn't go into great detail about what it was. 21 I wasn't trying to hide it. It is obvious that it is 22 there. I think this is something that Johnson shows in 23 a screen shot in his report. 24 Q. You understand this is a case about 25 representations made to consumers prepurchase.</p>	<p>175</p> <p>1 Q. Okay. But you would agree with me that in a 2 case about representations made to consumers 3 prepurchase, that the difference in language between the 4 paid and the free version is potentially important? 5 A. No. I don't agree that what you are telling 6 somebody when you are selling them something -- you 7 know, certainly when you are telling somebody that their 8 house is going to fall apart if you don't replace the 9 roof, I don't keep talking about how your house is going 10 to fall apart if you don't fix your roof while I'm 11 fixing the roof. 12 THE WITNESS: And that being said, can I take a 13 quick break? I need to use the bathroom. 14 MR. ARENSON: Sure. 15 (A brief recess was taken.) 16 MR. ARENSON: Okay. Go back on the record and 17 I'm going to introduce Exhibit 3. 18 (Ellis Exhibit Number 3, System Detection List, 19 was marked for identification.) 20 BY MR. ARENSON: 21 Q. Mr. Ellis, I will represent to you that this is 22 a document created by the FTC which lists out all of the 23 detections from the software we were just discussing, 24 which is ErrorPatrol. And, as you can see from this 25 document, there are two categories that ErrorPatrol has</p>
<p>174</p> <p>1 A. And this is -- yes, this is a representation and 2 this one happens to be an accurate one. 3 Q. And we are going to get into that in a minute. 4 But you understand this is a case about representations 5 made to consumers prepurchase. 6 A. Sure. 7 Q. Okay. And the fact that the free version 8 declares these severe system threats and lists four 9 potential outcomes and the paid version doesn't say 10 anything about that, you didn't think that was 11 significant enough to put in your report. 12 A. I'm sure that I did think it was significant. 13 It was significant enough to mention that there is a 14 difference and that it asks you -- and these are things 15 that were -- it is in my report in the sense that I 16 referred to it as a material that I relied upon and then 17 I mention in my procedures that I took screen shots of 18 software performing actions and that I made those screen 19 shots available. 20 And in retrospect I should have made that as an 21 attachment, and I will concede that point, that I should 22 have made it as an attachment. 23 Q. Okay. 24 A. And that that was an oversight on my part and 25 I'm totally responsible for that.</p>	<p>176</p> <p>1 detects issues and that's System Clean and Disk Clean, 2 and if you look at the last exhibit, you can see those 3 two there. Are you with me? 4 A. Yes. 5 Q. So, again, looking at Exhibit 2, ErrorPatrol 6 detect system clean issues and disk clean issues, and 7 this is a list of issues typed out because on the screen 8 they are too small. 9 MS. GURLAND: Do you want to enter this into 10 evidence as something? 11 MR. ARENSON: It is already a deposition 12 exhibit. 13 BY MR. ARENSON: 14 Q. So let's talk about the system clean errors 15 first; okay? 16 A. Okay. 17 Q. Now, let's take a look at the first three, which 18 all have the extension AIF; are you with me? 19 A. Sure. 20 Q. Okay. What's an AIF file? 21 A. It is audio -- I believe it is a multimedia 22 format. 23 Q. Audio interchange file? 24 A. Yeah, audio interchange. 25 Q. Okay. What do these three registry keys here</p>

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1 do?

2 A. What these do is if somebody is on a website and
3 they click on a link that has a dot AIF -- and the file
4 behind the link has a dot AIF extension, when they click
5 on it, because this registry entry exists and because it
6 does not have any sort of program ID associated with it
7 on the computer, it will cause that little popup that
8 you see that says save to disk or run --

9 Q. Is it accurate to say --

10 A. -- or open.

11 Q. -- this is an instruction to Windows as to what
12 file to use to open up AIF files; is that correct? Or
13 application, I should say.

14 A. No, that's not correct. I just explained to you
15 what these do.

16 Q. I don't understand so maybe you need to try
17 again.

18 A. If you are on a website --

19 Q. So this only applies to websites.

20 A. Yes. These entries only apply to -- there is
21 another section of the registry that does what you are
22 talking about.

23 Q. Okay. So explain this to me. If you are on a
24 website --

25 A. And you click on a link that has -- all right.

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1 So, first of all, these will exist in this area if there
2 is a program ID associated with a file, okay? These
3 will exist. These will stay in here and new entries
4 will come into here when you install new software.

5 But for anything that's orphaned in here -- and
6 I would say that what DriveCleaner was doing is finding
7 the orphaned entries.

8 Q. To be clear, we are talking about ErrorPatrol
9 right now. Let's stay focused.

10 A. I'm sorry.

11 Q. So continue your explanation of what these
12 registry keys do.

13 A. So when there is an orphaned entry in here and
14 you click on a link, a little popup will pop up that
15 says save to disk or open with.

16 Q. Okay.

17 A. If this entry is not in here and you click on
18 that, it will turn into a text link and nothing will
19 happen.

20 Q. Okay.

21 A. That's what all of these do, every single one of
22 them, in those circumstances.

23 Q. Okay. And these registry keys are part of
24 Windows when it ships from the factory; is that correct?

25 A. Not Windows 7 but in Windows XP, yes, these were

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1 shipped with Windows XP. And I would have to compare to
2 know exactly -- some of these are in Windows 7 but not
3 nearly to this extent.

4 Q. So there is some overlap in 7 and Vista?

5 A. I think in 7 the only thing -- you are not going
6 to get any orphaned entries in 7, I don't believe, and
7 Vista I couldn't speak to.

8 Q. So this shipped from the factory in Windows XP,
9 these registry keys shipped just like this.

10 A. Yeah.

11 Q. So every install of Windows XP in the world
12 would have these registry keys.

13 A. More than likely.

14 Q. Okay.

15 A. Just like every version of Windows XP that was
16 shipped had the problem with the -- one of the servers
17 that allowed the Sasser worm virus to pretty much take
18 control of many, many, many computers.

19 Q. Now, it is your testimony that these registry
20 keys are not orphaned in Windows 7 and Windows Vista or
21 you are not sure?

22 A. It would depend on what you have installed on
23 your program. I don't believe it ships with any -- I
24 haven't tested a brand-new install of Windows 7, but it
25 doesn't have the orphaned entries. Most of these

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1 entries -- I'm not going to speak to that because I
2 haven't compared the two.

3 Q. Do you know?

4 A. I do know that it is a lot smaller of a list and
5 that it is -- I don't believe that there were any
6 orphaned prog IDs in this key in Windows 7.

7 Q. So if we were to run ErrorPatrol on Windows 7,
8 would it detect these registry keys?

9 A. Oh, no.

10 Q. Why not?

11 A. Because they are not -- I'm fairly certain these
12 were taking just the ones that were orphaned that didn't
13 have actual programs IDs associated with them, like
14 there was no software installed on the computer that
15 would open AIFC files.

16 Q. I'm sorry, explain that to me.

17 A. I would really have to look at them one by one
18 and tell you. But all I can tell you right now with
19 certainty is what I have already told you, and that's
20 that orphan entries in here are a problem and that --

21 Q. Let's talk about that. These registry keys when
22 Windows ships from the factory are empty; is that a
23 correct way of saying it?

24 A. No. They don't reference any real program --
25 prog ID.

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<p>1 Q. Okay.</p> <p>2 A. Which is interesting in and of itself because an</p> <p>3 AVI should.</p> <p>4 Q. So --</p> <p>5 A. If the Windows Media Player views AVI, and I'm</p> <p>6 not sure that it does.</p> <p>7 Q. So if ErrorPatrol was run on any installation of</p> <p>8 Windows XP in the world, it would detect these same</p> <p>9 errors.</p> <p>10 A. If they existed. If there were entries that</p> <p>11 lacked prog IDs in this key, that's the ones -- that's</p> <p>12 my understanding of the software, that's what it was</p> <p>13 detecting.</p> <p>14 Q. And we have established that every copy of</p> <p>15 Windows XP that is installed in the entire world has</p> <p>16 these registry keys by default.</p> <p>17 A. On a clean install, yeah, I think so.</p> <p>18 Q. So any user in the world that ran</p> <p>19 ErrorPatrolFree -- let's focus on free versus paid --</p> <p>20 would receive this error message -- going back to</p> <p>21 Exhibit 2 -- about severe errors detected.</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Now, explain to me how these first three</p> <p>24 registry keys could -- would be very likely to create</p> <p>25 lost documents and profile settings.</p>	<p>1 Q. So it is accurate to say the registry keys</p> <p>2 wouldn't cause the lost documents and profile settings.</p> <p>3 That would be the malicious program attacking the</p> <p>4 computer.</p> <p>5 A. It would be the person exploiting the computer</p> <p>6 that's created by these registry keys.</p> <p>7 Q. Again, I'll keep asking the same question until</p> <p>8 you answer it. Is not the registry key that's</p> <p>9 causing --</p> <p>10 A. I'm not going to answer that question. That's a</p> <p>11 poorly formed question.</p> <p>12 Q. You don't get to grade the questions today,</p> <p>13 Mr. Ellis, unfortunately. I'm going to ask it again.</p> <p>14 It is not the registry key that's causing the</p> <p>15 lost documents and profile settings, it is the malicious</p> <p>16 hacker who would be doing that; is that correct?</p> <p>17 A. He couldn't have done it without the registry</p> <p>18 keys, so your question is lacking in the foundation</p> <p>19 needed to understand the answer.</p> <p>20 Q. There is no way that a malicious hacker can</p> <p>21 access a computer without these registry keys.</p> <p>22 A. No. There is other ways.</p> <p>23 Q. Lots of other ways, in fact.</p> <p>24 A. Sure, lots of other ways. For Windows XP,</p> <p>25 Service Pack 1, there were many, many ways to get in,</p>
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<p>1 A. The way it would work is that a remote operator</p> <p>2 of a website would create a malformed link that would</p> <p>3 refer to one of these files, and then you would click on</p> <p>4 it and you would -- the popup would pop up and then that</p> <p>5 would -- that could potentially deliver a payload to a</p> <p>6 trojan that was installed on the computer already. It</p> <p>7 would receive it and execute the code of the operator's</p> <p>8 choice. Any of these could do that.</p> <p>9 Q. Okay.</p> <p>10 A. In those particular circumstances.</p> <p>11 Q. Okay. In that case is it the registry key</p> <p>12 that's causing the lost documents and profile settings</p> <p>13 or is it the virus or trojan that's causing the lost --</p> <p>14 A. Well, the registry key created the security</p> <p>15 vulnerability that opened the door so it could happen.</p> <p>16 Q. Okay. So the registry key --</p> <p>17 A. And of itself no component in Windows, whether</p> <p>18 it be a service that's running that has a vulnerability,</p> <p>19 anything that is a vulnerability, in and of itself the</p> <p>20 vulnerability doesn't do anything. It is the people</p> <p>21 exploiting the vulnerability that causes the problem.</p> <p>22 Q. Okay. So --</p> <p>23 A. And I think that's a clear distinction between</p> <p>24 what's a vulnerability and what's the actual person</p> <p>25 performing the exploit on the person's computer.</p>	<p>1 and this would have just been one part of a concerted</p> <p>2 attack.</p> <p>3 Q. So we'll try it again and if you refuse to</p> <p>4 answer it, that's fine.</p> <p>5 The registry keys don't cause the lost</p> <p>6 documents. A third party who is loading malicious code</p> <p>7 onto the computer would be the actual cause of the lost</p> <p>8 documents.</p> <p>9 MS. GURLAND: Objection to asked and answered.</p> <p>10 You can answer it again if you want to answer it again.</p> <p>11 BY MR. ARENSON:</p> <p>12 Q. You don't want to answer that question.</p> <p>13 A. I don't know how to answer that question in a</p> <p>14 way that isn't ridiculous, because it -- you are making</p> <p>15 it sound like I'm -- like if I say -- you are making it</p> <p>16 sound like if I say no -- I'm not going to answer the</p> <p>17 question.</p> <p>18 Q. Okay. You are refusing to answer the question.</p> <p>19 MS. GURLAND: No. It is asked and answered. He</p> <p>20 is refusing to answer the same question for the fourth</p> <p>21 time.</p> <p>22 MR. ARENSON: Carolyn, you don't get to decide</p> <p>23 if it's answered.</p> <p>24 MS. GURLAND: I get to make objections, and my</p> <p>25 objection is asked and answered times four.</p>

<p style="text-align: right;">185</p> <p>1 MR. ARENSON: Okay. Your objection is on the 2 record. 3 BY MR. ARENSON: 4 Q. Why don't we continue to page through this list 5 of registry keys, and just tell me if your answer is 6 going to be the same because we don't need to go through 7 every one. 8 A. Yes, my answer is going to be the same. This is 9 just an exploit -- 10 Q. Why don't you actually look at them before you 11 decide that. 12 Is your answer the same for all of these 13 registry keys; that all of these registry keys could be 14 exploited by a third party and that could result in the 15 horrible things described in this popup? 16 MS. GURLAND: Objection to the characterization 17 of the words in the popup. 18 A. Well, I don't believe that all of them would be, 19 because some of them are handled by other parts of 20 Windows, but what the software is trying to do is 21 identify orphaned items in this key. 22 BY MR. ARENSON: 23 Q. Are there entries here that would not be very 24 likely to create lost documents and profile settings? 25 A. I would say like the HTML one is handled by</p>	<p style="text-align: right;">187</p> <p>1 Q. And I'm not asking you to try to explain why 2 they are here. I want to focus on if these are very 3 likely to cause lost documents and profile settings. 4 So you said the GIF and JPEG, HTML. Any other 5 of these registry keys that would not be very likely to 6 create lost documents and profile settings? Just look 7 through the list and, if you would, just call them out 8 and I will make a mark. 9 A. It would depend on the user system. Like on a 10 fresh system -- I don't even really want to -- I don't 11 really want to go there, because I don't know the extent 12 that these could cause harm on a system postlaunch -- 13 say if somebody removed Internet Explorer and used 14 something else, then certainly these could cause trouble 15 if they were using a different program or if they 16 removed certain software from their machines, then these 17 could cause troubles. There are too many variables. 18 Q. Would you say that's a very likely outcome? 19 A. That people modify their systems heavily? 20 Q. That people remove Internet Explorer and add a 21 different program and then run -- how you just described 22 it, you tell me. 23 A. Yeah. 24 Q. That's a very likely outcome. 25 A. Certainly people remove software from their</p>
<p style="text-align: right;">186</p> <p>1 Internet Explorer so that would be a prog ID that would 2 be in a different location, so it wouldn't cause the 3 effect that we talked about. 4 But I would also qualify that by saying that 5 that shouldn't be in there and how would the software 6 know to differentiate. It would -- text scanning and 7 text searching is one of the most -- it is one of the 8 most exhaustive and CPU -- it is one of the most 9 intensive processes that a computer can undertake to do. 10 So to be able to say, okay, I'm going to start 11 doing a semantic interpolation of what these are and 12 comparing them to a database, it creates more overhead 13 for the software when it's easy to say these shouldn't 14 be here, get rid of them. The temp directories 15 shouldn't contain anything, just get rid of it all. It 16 doesn't matter what it is, just get rid of it. 17 Q. So are there other entries here that would not 18 be, quote, very likely to create lost documents and 19 profile settings? You said the HTML is one of them. 20 A. Right. 21 Q. Are there others? 22 A. I would say that, if anything, GIF, JPEG. I 23 haven't tested that particular -- I'm not sure why these 24 are in here to begin with, why they would be in this 25 area of the registry.</p>	<p style="text-align: right;">188</p> <p>1 computers that they don't want that helps with Windows. 2 I don't know the extent anymore that you can remove 3 Windows Explorer. I know you can certainly deactivate 4 it and prevent it from working. 5 Q. So is it -- you said you don't want to talk 6 about it. 7 A. I said that there is too many variables to 8 really accurately sit here and do any accurate forensics 9 on this. 10 Q. So you are not sure in the case of at least some 11 of these registry keys whether they would be very likely 12 to cause lost documents and profile settings. 13 A. I'm not sure, that's right. 14 Q. And I assume the answer is the same for the 15 other three conditions: Physical data loss, system not 16 starting up, system slowdowns, crashes, and freezes. 17 A. That's right. 18 Q. Same answer that you just gave. 19 A. That's right. 20 Q. Okay. Now, you said that your wife is running a 21 laptop with Windows XP; is that right? 22 A. Yes. 23 Q. Have you removed all of these registry keys from 24 her laptop? 25 A. I don't manage -- I don't -- the shoekeeper's</p>

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1 son has no shoes, right? No. I think I might have
2 actually -- I may actually have run DriveCleaner on her
3 machine.

4 **Q. You ran DriveCleaner on her machine?**

5 A. Not DriveCleaner, whichever one we are talking
6 about.

7 **Q. You ran ErrorPatrol on her machine?**

8 A. I don't recall if I did or not. Certainly I
9 wouldn't -- they should be removed and I -- yeah.

10 **Q. That's not what I asked you.**

11 A. It is my wife's machine.

12 **Q. Did you tell me it was your computer before you
13 gave it to your wife?**

14 A. Yes, it was mine before.

15 **Q. So when it was your computer, did you remove all
16 of these registry keys?**

17 A. No. I actually didn't know about them at that
18 time. That was years ago.

19 **Q. Okay. And with -- now that your wife is running
20 the computer, you haven't gone and removed all of these
21 registry keys.**

22 A. No. But I'm going to tonight.

23 **Q. Okay. That's fair.**

24 A. My wife isn't one to wander around aimlessly on
25 the Internet clicking on things.

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1 **Q. But I thought you told me that it was very
2 likely that if you had these registry keys you could
3 experience lost documents, physical data loss, system
4 not starting up; right?**

5 A. I said in the circumstances as I described them
6 where you clicked on a malformed link, and this is --

7 **Q. That's an important distinction, because what
8 the software is telling us is that it is very likely
9 that these problems will result.**

10 A. Well, in 2006 and 2007 the Internet was a lot
11 more dangerous than it is today. It was very likely --

12 **Q. During 2006 and 2007 had you removed these
13 registry keys from your Windows XP laptop?**

14 A. No, I didn't know about them yet, and I did
15 click on a link once that did cause my computer to be
16 compromised, and I discussed that with you earlier.

17 I couldn't tell you this is exactly how it
18 happened, but I do remember a dialogue popping up asking
19 me if I wanted to open a file, and I tried to cancel it
20 and that's when things went south quickly. So there
21 were a lot of people that were experiencing issues.
22 There were a lot of exploits.

23 **Q. Okay. All right. Why don't we move on to the
24 disk clean errors, which is the second half of the
25 detections here, and that's the last page. It is just a**

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1 **one-pager.**

2 A. Okay.

3 **Q. Again, I will represent to you that this is an
4 FTC created document that just lists all of the disk
5 clean errors that are found by ErrorPatrol.**

6 **Now, if you take a look at these, every one but
7 one is a file within the Windows prefetch directory.**

8 A. Every one of these files but one is in the
9 prefetch directory?

10 **Q. True or untrue?**

11 A. They all look to be in the prefetch directory.

12 **Q. What about the last one?**

13 A. Oh, that's like a history item.

14 **Q. Okay. So am I right when I say that every one
15 but one is in the prefetch directory?**

16 A. Yes. The bottom one is not a directory so I was
17 confused.

18 **Q. Can you explain to me what function is served by
19 Windows prefetch?**

20 A. It allows like for -- when you are running
21 certain pieces of software, it allows it to run more
22 quickly.

23 **Q. Okay. Now --**

24 A. It is like a place where software things can get
25 cached.

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1 **Q. Okay. Now, which one of these files listed here
2 do you believe is very likely to create lost documents
3 and profile settings?**

4 A. It is an accumulation of files here that causes
5 the problem. It is not any individual file.

6 **Q. Okay. So --**

7 A. So if you were to let this go unchecked and just
8 let your temp folders fill up and let your files --
9 eventually your computer would, in fact, crash and die
10 and it happens.

11 **Q. Okay. Well, this is run on a clean image. This
12 is run right after bootup on a clean image. Now, in
13 this condition, would these files be very likely to
14 cause lost documents and profile settings?**

15 A. That's an extreme, I think. You are going with
16 what the extreme interpretation of that popup is, and --

17 **Q. I'm not asking you to do --**

18 A. I believe if we look at the popup it says -- it
19 says they are very likely to. It doesn't say these
20 definitely are causing it. It says they are very likely
21 to create further problems if not fixed.

22 **Q. Okay. So do you believe that these --**

23 A. Yeah, I mean, I know there is problems on my
24 computer. If we don't fix them, eventually my computer
25 will crash.

<p style="text-align: right;">193</p> <p>1 Q. So these files that are listed here which were 2 detected as severe system threats -- and why don't we 3 start there. Do you agree these are severe system 4 threats? 5 A. I would agree that eventually that this area -- 6 files in this area eventually could lead to performance 7 degradation of your machine. 8 Q. I understand that's your position. I'm asking 9 you are these files, which have been detected as severe 10 system threats, are they severe system threats? 11 A. These files in and of themselves, I don't -- I 12 don't know. I don't know if these are executables. The 13 prefetch area doesn't have the tightest permission and 14 securities in the world. I don't know if there is an 15 exploit that's out there that can grab one of these 16 files and do damage. 17 So I would say keep that area clean and that 18 would be my recommendation to people. If I see files in 19 there, I would say this is an area that needs to be kept 20 clean. This is an area of the computer that lots of 21 security products do keep clean and will identify as 22 being areas that should be kept clean. And at this 23 moment in time I'm not exactly certain if they are a 24 security threat or not but it's something I would like 25 to look into further.</p>	<p style="text-align: right;">195</p> <p>1 A. Again, we talked about how software can't 2 necessarily differentiate between what's semantically -- 3 because there can be thousands upon thousands of files 4 in here and to compare that to a database and there is 5 maybe millions of files in temp directories -- so you 6 could have millions of files in your Internet temporary 7 folders, and for you to give me that list and say this 8 one's not harmless or this one's not harmless, that 9 doesn't make sense to me because it's all of them 10 together that need to be cleaned out. 11 I think that's in the spirit of the software, 12 saying these areas need to be kept clean and these don't 13 need to be here. It wasn't necessarily picking out this 14 file is going to cause your computer to crash. 15 Q. That may be what you think the software -- 16 A. That's not how I understand it. That's not how 17 I interpret it. 18 Q. That's fine. And you are entitled to your 19 interpretation. As I read this it says there are 286 20 severe system threats and this file, NTOSBOOT, is one of 21 those severe system threats. 22 Now, do you believe that NTOSBOOT is a severe 23 system threat? Yes or no? 24 A. No. 25 Q. Okay. And do you believe that NTOSBOOT is very</p>
<p style="text-align: right;">194</p> <p>1 Q. Okay. You are not sure. So let's look at the 2 bolded item here, which is about almost halfway down 3 the list. 4 A. Okay. 5 Q. Do you recognize that file? 6 A. NTOSBOOT? 7 Q. Yep. 8 A. I'm not sure what that file is, no. It must be 9 the -- something to do with the boot record of the 10 machine. It probably -- possibly the machine is built 11 and it dumps stuff into here. 12 Q. Would it surprise you to learn that file is a 13 boot trace file? 14 A. No, it wouldn't surprise me. 15 Q. Okay. Were you aware that this file is accessed 16 every time that Windows boots up? 17 A. I would have to verify that. 18 Q. So you weren't aware of that. 19 A. No. 20 Q. Were you aware that if you delete this file, 21 Windows will automatically recreate it upon every 22 bootstrap? 23 A. I know that there is a lot of files that if you 24 delete it, it will recreate them, yes. 25 Q. For this specific --</p>	<p style="text-align: right;">196</p> <p>1 likely to cause lost documents, physical data loss, 2 system not starting up, or system slowdowns, crashes, 3 and freezes? 4 A. Well, if it is a file that Windows NT reads and 5 creates and looks at during the boot cycle, I don't 6 think I would want anybody to get anything -- yeah, that 7 could be interesting if somebody were to put something 8 into there and -- some sort of code that could inject 9 into the operating system at boot. I shouldn't be 10 speculating so I will stop but -- 11 Q. Well, in your version of Windows 7, do you 12 delete the Windows prefetch directory? 13 A. Yes, I believe I run Port Impulse CCleaner on my 14 computer periodically. 15 Q. Well, NTOSBOOT would recreate itself every time 16 you reboot your machine. 17 A. Right. 18 Q. Do you go into your prefetch directory every 19 time you reboot your machine and delete that file? 20 A. No, but it would be gone. It would be gone when 21 the computer shuts down and restarts. It has to 22 recreate it from somewhere else. The one that's already 23 there isn't going to be used. 24 Q. Do you run CCleaner every time -- 25 A. And I don't know exactly what the file does, so</p>

<p style="text-align: right;">197</p> <p>1 I can't speak to -- at this moment.</p> <p>2 Q. You can't say that this is a severe system</p> <p>3 threat that's very likely to cause lost documents,</p> <p>4 physical data loss, system not starting up, and system</p> <p>5 slowdowns, crashes, and freezes.</p> <p>6 A. If there were a million files listed here and</p> <p>7 you went through each one of them and asked me that, I</p> <p>8 would say no. So I'm going to say no to all of them</p> <p>9 individually. It is the collective that is the problem.</p> <p>10 Q. Okay.</p> <p>11 A. But you are -- never mind.</p> <p>12 Q. Now, on your computer at work -- you work at</p> <p>13 kCura and you have a Windows 7 desktop there; is that</p> <p>14 correct?</p> <p>15 A. And I'm not going to discuss anything about how</p> <p>16 our IT department takes care of my computers at work or</p> <p>17 how I take care of my computer. I have an IT department</p> <p>18 that's responsible for the security on my machine. I</p> <p>19 have other things to be doing.</p> <p>20 Q. Do you know if your IT department routinely</p> <p>21 deletes the prefetch files out of your work system?</p> <p>22 A. I do not know.</p> <p>23 Q. And if you believed that these were dangerous</p> <p>24 files that were likely to cause the problems we have</p> <p>25 discussed, wouldn't you insist that these files be</p>	<p style="text-align: right;">199</p> <p>1 has no bearing or relevance here.</p> <p>2 Q. All right. Were you aware that every time an</p> <p>3 application launches in Windows, there is an application</p> <p>4 trace file created in the prefetch directory?</p> <p>5 A. I'm not familiar -- I'm not familiar with that</p> <p>6 process. I know that when an application launches,</p> <p>7 there is a counter that latches onto the process, and it</p> <p>8 stores information that other software applications use.</p> <p>9 Perhaps that's the file where it puts them. And, again,</p> <p>10 we talked about these are files that are used to enhance</p> <p>11 the performance of applications, so that's very probably</p> <p>12 where that performance improvement comes from, is it</p> <p>13 stores that information there.</p> <p>14 Q. Okay.</p> <p>15 A. And those files can get large and get to be a</p> <p>16 lot of them because the Internet also, I believe, uses</p> <p>17 this area. When you install a software, an installer</p> <p>18 will run and it will get a file in there. There is a</p> <p>19 lot of software programs out there that will remove the</p> <p>20 prefetch files.</p> <p>21 Q. If it is true that every time you launch an</p> <p>22 application something is added, a prefetch file is added</p> <p>23 to the prefetch directory, it would be virtually</p> <p>24 impossible to keep that directory empty of files, would</p> <p>25 it not?</p>
<p style="text-align: right;">198</p> <p>1 deleted from your computer?</p> <p>2 A. Well, I do know that I have had a VM stop</p> <p>3 working that they were taking care of.</p> <p>4 Q. That's interesting but I'm not sure that answers</p> <p>5 the question.</p> <p>6 A. So point taken. Perhaps I should be more</p> <p>7 involved in what's going on with my machine.</p> <p>8 Q. Because if your machine crashed and you couldn't</p> <p>9 start it up again, that wouldn't be a good outcome at</p> <p>10 work; right?</p> <p>11 A. I would just get another VM. I'm not so</p> <p>12 attached to my computers that if they die -- I'm not</p> <p>13 that attached to them. My files are in a share. I</p> <p>14 would have to reload some software but there is a</p> <p>15 snapshot of my VM from at least a month ago.</p> <p>16 Q. But you have never told your IT department, hey,</p> <p>17 guys, we should shall deleting these prefetch files</p> <p>18 because they are dangerous.</p> <p>19 A. I don't do that any more than your legal aides</p> <p>20 tell you how to practice law.</p> <p>21 Q. You would be surprised.</p> <p>22 A. They are the IT guys. That's their job. I</p> <p>23 don't go tell them how to do their job and they don't</p> <p>24 tell me how to do mine. Again, I don't want to discuss</p> <p>25 the internal politics of the company I work for. That</p>	<p style="text-align: right;">200</p> <p>1 A. That's the point, is to just minimize the</p> <p>2 possibility that that area will grow very large. Just</p> <p>3 like the temp directories and the Internet temporary</p> <p>4 files, those can be large as well.</p> <p>5 Q. Let me show you an example and maybe we can make</p> <p>6 this a little bit more concrete.</p> <p>7 A. I don't have any anecdotal stories to tell you</p> <p>8 about the prefetch. All I can say is that the prefetch</p> <p>9 falls under the category of temp files that are not</p> <p>10 cleaned up by Windows and anecdotally I can tell you</p> <p>11 that the temp folders can get to be massive; that</p> <p>12 Windows can create temp files that literally will cause</p> <p>13 a computer to stop working.</p> <p>14 Q. Let's introduce Exhibit 4 at this point.</p> <p>15 MS. GURLAND: I'm going to object to that</p> <p>16 methodology of introducing exhibits that he's not being</p> <p>17 asked to -- that no one is authenticating and we have</p> <p>18 no -- absolutely no idea where they come from other than</p> <p>19 they are a piece of paper that you say you got</p> <p>20 somewhere.</p> <p>21 The procedure in these depositions has been to</p> <p>22 say is it a true and authentic copy of something. He</p> <p>23 doesn't have any information to give about these things.</p> <p>24 I object to this methodology in this deposition. I</p> <p>25 don't know what these are, who made them, where they</p>

<p style="text-align: right;">201</p> <p>1 came from or when. I don't know that they were made 2 from any of the software programs that we have been 3 analyzing or that Mr. Ellis has any familiarity with. 4 I'm going to object to that process and go back 5 and object to 2 and 3 as well, just because -- to the 6 extent that I don't know what they are and where they 7 come from. 8 MR. ARENSON: Okay. Your objection is on the 9 record. 10 MS. GURLAND: And if it is not introduced into 11 evidence, then I object to talking about it and reading 12 from it until we can figure out what in the name of -- 13 what it is. 14 MR. ARENSON: Your objection is on the record. 15 (Ellis Exhibit Number 4, ErrorPatrol Screen 16 Shot, was marked for identification.) 17 BY MR. ARENSON: 18 Q. Moving on to Exhibit 4. I will represent to you 19 that this is a test that I actually conducted, and what 20 I did here was delete everything from the prefetch 21 folder. I then ran two programs in Windows, and that 22 would be Solitaire and Mind Sweeper, two games that ship 23 with all versions of XP as understand it. I then ran 24 ErrorPatrol and these are the results. 25 If you take a look, SOLEXE and WINMINE.EXE both</p>	<p style="text-align: right;">203</p> <p>1 MS. GURLAND: -- ran in his office. If you 2 would like to speculate about tests that the attorney, 3 who can never be examined about a test, ran, if you want 4 to speculate about his test that he ran himself, you 5 can. 6 BY MR. ARENSON: 7 Q. Mr. Ellis, you are actually obligated to answer 8 my question, so you should ignore Ms. Gurland's 9 statement. 10 MS. GURLAND: If you can answer it, answer it. 11 A. Okay. 12 BY MR. ARENSON: 13 Q. My question to you is, are these three files in 14 the Windows prefetch directory, are those severe system 15 threats? 16 A. They fall in the same category as the 17 questions -- as the files that -- as just the general 18 discussion that we are having when we talk about keeping 19 areas clean. So the question really is and can be 20 translated directly into does allowing things to pile up 21 in here threaten your system. The answer is yes. 22 And that's the nature of the problem, that's the 23 nature of the question, that's the -- that's really 24 what's going on here, is that things can pile up in 25 here, and when things pile up in here, it is a threat.</p>
<p style="text-align: right;">202</p> <p>1 appear in the prefetch directory and they also were 2 detected as severe system threats by ErrorPatrol; do you 3 see that? 4 A. I don't see where you are saying that they are 5 detected as severe system threats. 6 Q. That's a fair point. So this is the screen 7 after you get the severe system threat warning. 8 A. Okay. I will take your word for it. 9 Q. I will represent to you -- if it is false, I 10 will take responsibility. I will represent to you that 11 these were detected as severe system threats, just like 12 the other ones were, and, in fact, everything in the 13 Windows prefetch directory is detected as a severe 14 system threat. 15 Now, in this case -- and I should also point out 16 that ERP.EXE was added to the Winfetch directory, which 17 is ErrorPatrol's prefetch entry. 18 Now, in this case, are any of these three files 19 severe system threats? 20 MS. GURLAND: I object to -- I want to renew my 21 objection on the record to this case -- and, Mr. Ellis, 22 you can answer these questions to the extent that you 23 would like to speculate about tests that Mr. Arenson, 24 not an expert -- 25 MR. ARENSON: Totally inappropriate objection.</p>	<p style="text-align: right;">204</p> <p>1 Q. And do you understand that things are allowed to 2 pile up unchecked in the Windows prefetch directory? 3 That Windows doesn't have any mechanism to maintain that 4 directory itself? 5 A. Windows has mechanisms in place to do a lot of 6 things that it doesn't do, that don't get activated, 7 that are supposed to happen at certain times, and if 8 they don't happen, then the areas won't get cleaned up. 9 Q. So -- 10 A. I don't -- this says -- it is calling -- it is 11 putting it under the category of Internet history and, 12 why, I'm not sure. I would want to do more exploration 13 of how the prefetch works. I'm not going to tell you 14 that, no, there is nothing in place to clean up the 15 prefetch, but I do know that there are tools out there 16 that want to clean this area up. 17 Q. So back to my question: Do you believe that 18 these three files are severe system threats? 19 A. Not in and of and by themselves. 20 Q. Okay. Let's go to Exhibit 5, which is a screen 21 shot directly from Microsoft's website. 22 Read that and let me know when you are ready. 23 (Ellis Exhibit Number 5, Screen Shot From 24 Microsoft's Website, was marked for identification.) 25 BY MR. ARENSON:</p>

<p style="text-align: right;">205</p> <p>1 Q. Are you ready? 2 A. I'm ready. 3 Q. So according to this article on Microsoft's own 4 website, the Windows prefetch folder is, quote, 5 "self-maintaining and there is no need to delete it or 6 empty its contents. If you empty the folder, Windows 7 and your programs will take longer to open the next time 8 you turn on your computer." 9 Do you disagree with Microsoft on this? 10 MS. GURLAND: I would like to lodge an objection 11 before you read from this, which hasn't even been 12 introduced into evidence yet. It is totally irrelevant. 13 It is Microsoft 2010. We're not talking about what 14 happened in 2010. We are talking about things that 15 happened in 2005, 2006, -7. 16 There is absolutely no relevance that this has 17 to anything in this case and there is no information 18 that this shows up or has ever -- that this was the 19 system or this was the advice that Microsoft had at the 20 point in time that's relevant to this case as opposed to 21 in 2010. 22 MR. ARENSON: Thanks for your objection. 23 BY MR. ARENSON: 24 Q. Mr. Ellis, you can answer. 25 A. The article applies to Windows Vista. I will</p>	<p style="text-align: right;">207</p> <p>1 whether the Windows prefetch file is self-maintaining? 2 A. I don't -- I can't say whether it is or not. 3 All I can tell you is there must be a reason why so many 4 software manufacturers clean it out. 5 Q. And based on your knowledge today and, again, 6 more importantly when you wrote your report, you can't 7 say whether you agree or disagree with Microsoft's 8 advice not to delete files in the prefetch folder. 9 A. I don't know. 10 MS. GURLAND: Now would be a good time for a 11 break for me. 12 MR. ARENSON: Sure. We can take a brief break. 13 (A brief recess was taken.) 14 MR. ARENSON: Okay. Back on the record and we 15 are going to introduce Exhibit 6. 16 (Ellis Exhibit Number 6, ErrorPatrol Screen 17 Shots, was marked for identification.) 18 BY MR. ARENSON: 19 Q. Mr. Ellis, more questions about ErrorPatrol 20 here. 21 MS. GURLAND: Can I make my same objection? 22 MR. ARENSON: Please. 23 MS. GURLAND: Unless this is a screen shot that 24 comes from an expert or Mr. Ellis, same objection. 25 MR. ARENSON: More FTC testing of these</p>
<p style="text-align: right;">206</p> <p>1 not disagree with this. This applies to Windows Vista. 2 Q. Do you think Microsoft's advice is different as 3 to Windows XP? 4 A. I don't know. 5 Q. Okay. So you don't know whether the Windows 6 prefetch folder in XP is self-maintaining. 7 A. I have seen that they do get quite a bit of 8 files in there, and that if -- certainly if this is 9 accurate, that it is looking at all of these files to 10 help you kind of -- to help determine how to manage 11 things, having fewer amounts of files in there should 12 improve performance because Windows isn't trying to 13 anticipate too much of what you are doing. And that can 14 certainly happen. 15 And, again, I would -- I would love to spend 16 more time with this. I will definitely spend more time 17 with what prefetch does and how it works and I'll pick 18 it apart and figure it out. But at this moment in time 19 I would say it definitely requires further exploration, 20 and I would love to get back to you on that, and I would 21 be happy to sit down with you again just to discuss this 22 point. 23 Q. So is it fair to say, based on your knowledge 24 right now, based on what you know today and more 25 importantly when you wrote your report, you can't say</p>	<p style="text-align: right;">208</p> <p>1 programs. 2 MS. GURLAND: Okay. So the same objection that 3 I made before. There is not any foundation for this 4 exhibit and there won't be any way to lay a foundation 5 of this exhibit. There is not any way to know if this 6 is really ErrorPatrol that was being tested, what tests 7 were run, how the tests were run, and what machine the 8 tests were run on, and it is inadmissible as a document. 9 BY MR. ARENSON: 10 Q. All right. Mr. Ellis, were you aware that 11 ErrorPatrol detects any file in the cookie folder as a 12 severe system threat? 13 A. Yes. 14 Q. And do you agree with that characterization of a 15 cookie? 16 A. I don't like cookies. 17 Q. So -- 18 A. I'm a huge proponent of removing any cookies at 19 all that land on your system that are not directly 20 related to an application that you are actively using 21 that requires those cookies to function properly. 22 Q. And while I understand your personal preference, 23 would you say that a cookie is a severe system threat? 24 A. I would say it could be. 25 Q. Would you say that a cookie is very likely to</p>

<p style="text-align: right;">209</p> <p>1 create lost documents and profile settings?</p> <p>2 A. The potential is there.</p> <p>3 Q. And how would that be?</p> <p>4 A. Through an exploit that existed. I believe in</p> <p>5 2006, 2005, around that time, there was an exploit that</p> <p>6 would allow anybody to read any cookie at all that was</p> <p>7 on your system, which cookies could contain passwords</p> <p>8 and stuff like that.</p> <p>9 So, yeah, it was definitely something that all</p> <p>10 software was wanting to -- any security software at all</p> <p>11 would scrub cookies from your system if you wanted to</p> <p>12 keep it clean.</p> <p>13 Q. Is there other software that declares cookies a</p> <p>14 severe system threat or a manual or some type of an</p> <p>15 authoritative document that you can point me to where</p> <p>16 cookies are defined as a severe system threat?</p> <p>17 A. I guess that would depend on what your</p> <p>18 definition of "severe" is and some people have different</p> <p>19 definitions of severe.</p> <p>20 There are definitely people that are out there</p> <p>21 that are experts in the field that consider cookies to</p> <p>22 be -- at that time they were considered to be a severe</p> <p>23 threat. The security has tightened up on them so it is</p> <p>24 not so easy to read cookies that are not your own, but</p> <p>25 there was a time that you could read cookies that were</p>	<p style="text-align: right;">211</p> <p>1 A. Any time your computer gets comprised those</p> <p>2 things can happen. It would depend on the nature of the</p> <p>3 cookie itself, and, again, it talks about doing -- the</p> <p>4 software is doing such a detailed analysis to figure out</p> <p>5 what the cookie is.</p> <p>6 They are just garbage. Generally speaking,</p> <p>7 cookies are garbage left behind by people that want to</p> <p>8 track user activity on different websites that are</p> <p>9 affiliated together.</p> <p>10 Q. Cookies never serve a beneficial purpose?</p> <p>11 A. Sure, they do. They can be used to store your</p> <p>12 passwords and things likes that. And that was the</p> <p>13 problem at the time, that there was a belief -- and I'll</p> <p>14 have to get back to you on that, but there was a belief</p> <p>15 that cookies could be read by people that shouldn't be</p> <p>16 reading them.</p> <p>17 Q. So just so we have a clean answer on that last</p> <p>18 question, can you point me to any authoritative source</p> <p>19 that states that cookies are very likely to create</p> <p>20 physical data loss, systems not starting up, or system</p> <p>21 slowdowns, crashes, or freezes?</p> <p>22 A. The cookie by itself -- and we have had this</p> <p>23 conversation a number of times today; that things by</p> <p>24 themselves that represent vulnerabilities are not going</p> <p>25 to cause problems in and of themselves. It is when</p>
<p style="text-align: right;">210</p> <p>1 not your own.</p> <p>2 Q. Can you give me an example of an expert that</p> <p>3 declares cookies a severe system threat?</p> <p>4 A. I would say that I would be one that would say</p> <p>5 cookies at that time -- I would have to go back and look</p> <p>6 through but companies like -- you know, when that</p> <p>7 exploit was -- existed. Anybody who was involved in</p> <p>8 security was concerned about that.</p> <p>9 Q. But let's be careful with our words. Severe</p> <p>10 system threat is what we are talking about here.</p> <p>11 Can you point me to any authoritative source in</p> <p>12 which cookies have been defined as a severe system</p> <p>13 threat?</p> <p>14 A. I would gladly research that for you later. At</p> <p>15 this moment in time, I cannot.</p> <p>16 Q. What about any authoritative source that states</p> <p>17 that cookies are very likely to create lost documents</p> <p>18 and profile settings?</p> <p>19 A. I would say that would be part and parcel of my</p> <p>20 previous answer.</p> <p>21 Q. So you can't point to anything right now.</p> <p>22 A. I can't point to anything right now.</p> <p>23 Q. And would your answer be the same for the other</p> <p>24 three categories; physical data loss, system not</p> <p>25 starting up, and system slowdowns, crashes, and freezes?</p>	<p style="text-align: right;">212</p> <p>1 somebody exploits the vulnerability that you get the</p> <p>2 problem, so yeah.</p> <p>3 Q. And it is your position that any cookie is a</p> <p>4 vulnerability?</p> <p>5 A. It depends on the cookie.</p> <p>6 Q. Do you know if ErrorPatrol can differentiate</p> <p>7 between --</p> <p>8 A. I don't think it can.</p> <p>9 Q. Let me finish the question.</p> <p>10 Do you know if ErrorPatrol can differentiate</p> <p>11 between the type of cookies that you believe are</p> <p>12 dangerous and the type of cookies that aren't?</p> <p>13 A. No, I don't think it can.</p> <p>14 Q. And do you think it is likely that ErrorPatrol</p> <p>15 would have detected any cookie in the cookie folder as a</p> <p>16 severe system threat?</p> <p>17 A. Yeah, I think that's how the software operates.</p> <p>18 Q. And in some cases those would actually not be</p> <p>19 severe system threats.</p> <p>20 A. That would be accurate.</p> <p>21 Q. In fact, in the experiment that I conducted, if</p> <p>22 you take a look at the first page of this exhibit, I</p> <p>23 created a text file called "not a cookie" within the</p> <p>24 cookie folder, and, indeed, ErrorPatrol detected that as</p> <p>25 a severe system threat.</p>

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1 A. Okay.
 2 **Q. Now, that's not a severe system threat, is it?**
 3 A. No. But if it contained passwords, if you had
 4 put your passwords in there, then that would be a severe
 5 system threat.
 6 **Q. I will represent to you that it didn't.**
 7 A. And I will represent to you that -- how would it
 8 know?
 9 **Q. Okay. So ErrorPatrol doesn't know one way or**
 10 **the other --**
 11 A. No software would be able to know except for the
 12 software that created the cookie.
 13 **Q. Right.**
 14 A. Or somebody what had expertise in reading
 15 cookies for that specific purpose.
 16 **Q. So let's flip to the -- the first two pages are**
 17 **just two screen shots to show you the cookie files. The**
 18 **third screen shot is a run of ErrorPatrolFree on a**
 19 **computer that was connected to the Internet.**
 20 **And if you flip to the last page --**
 21 MS. GURLAND: I would like to renew my
 22 objection, same objection, as when this -- as to the
 23 methodology and -- to the use of this exhibit and to the
 24 methodology in which this is being conducted with tests
 25 that we have no way of knowing anything about and would

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1 never be able to examine an attorney on the case.
 2 BY MR. ARENSON:
 3 **Q. Okay. If you look at the last page, you will**
 4 **see that on this computer that was connected to the**
 5 **Internet a series of Internet sites were visited.**
 6 **House.gov, the website for the United States House of**
 7 **Representatives; mdd.uscourts.gov, which is the website**
 8 **for the federal court that is trying this case;**
 9 **senate.gov, the United States senate; whitehouse.gov,**
 10 **self-explanatory; and fcc and ftc.gov.**
 11 **Now, all of those visits were detected as severe**
 12 **system threats by ErrorPatrol. Do you agree that all of**
 13 **those visits are severe system threats?**
 14 A. Were those cookies? No.
 15 **Q. I can't answer that question.**
 16 A. That's Internet history.
 17 **Q. I can't answer that question. All I can tell**
 18 **you is what ErrorPatrol reported.**
 19 **Now, do you believe that all of those visits are**
 20 **severe system threats?**
 21 A. That would be very subjective to the person who
 22 was making those visits. If you really didn't want
 23 people to know that you were visiting those websites and
 24 somebody came along and seized your computer, for
 25 example, and looked -- yeah. I mean, it is privacy,

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1 right? That's going to have --
 2 **Q. So it would depend on the privacy preferences of**
 3 **the individual.**
 4 A. Exactly.
 5 **Q. So some people wouldn't care that you are**
 6 **looking at their browsing history and some people would.**
 7 A. Exactly.
 8 **Q. But, in any case, ErrorPatrol would detect all**
 9 **of your visits as severe system threats.**
 10 A. Yeah.
 11 **Q. So -- now, the other half of the equation is**
 12 **that ErrorPatrol says that these cookies -- I'm sorry,**
 13 **these website visit records are very likely to create**
 14 **lost documents and profile settings. How would that be**
 15 **the case?**
 16 A. You know, the bigger your history becomes, the
 17 more difficult -- and you begin to experience -- you
 18 could begin to experience performance issues. And it is
 19 really a -- it is the sum total that's the problem, is
 20 when you have an extremely large DAT file that's
 21 containing all your histories and you have lots of
 22 temporary files on your Internet and in your temp
 23 directory, you have lots of files left over from
 24 updates, lots of things in the prefetch folder that are
 25 impacting performance.

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1 And this is the fact, that when these things
 2 begin to pile up on computers at this time, this -- it
 3 was the accumulation of all of these things that would
 4 cause performance problems that would impact your system
 5 performance to the degree where, yes, you could
 6 experience those things. At this small amount, no.
 7 **Q. And do you think ErrorPatrol was able to**
 8 **differentiate between a large number of URL visits and a**
 9 **small number as, in this case?**
 10 A. I don't think it was differentiating. I don't
 11 think it had any threshold set that said maybe 20 items
 12 in the history is okay but 300,000 items is not.
 13 And that's generally how these software programs
 14 work; they say this is a problem, you need to clean it
 15 up, even if there is just one cookie or one URL history
 16 item in there. They will mention it and say these are
 17 problems.
 18 **Q. Just to be clear, in this case with just a few**
 19 **visits to websites, you don't think that that's very**
 20 **likely to create lost documents and profile settings,**
 21 **do you?**
 22 A. I think it is a good start.
 23 **Q. It is a clever answer but maybe not an answer to**
 24 **the question.**
 25 **In this case do you believe that these few**

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1 visits to URLs would be very likely to create further
2 problems, such as lost documents and profile settings?
3 A. I would say that it depends on if there is a
4 thousand more or if there is just -- it sounds like you
5 are saying that there is just these ones, so I'm saying
6 not likely.
7 Q. So with a small number of visits, not likely.
8 A. Not likely.
9 Q. And do you have any idea of how many visits it
10 would take before you reached the threshold of lost
11 documents and profile settings?
12 A. It would depend on the system as a whole. I
13 couldn't tell you. It could be, you know, the straw
14 that broke the camel's back. It could be the first
15 straw you put on the camel's back. It just depends on
16 how many straws you have loaded onto the camel's back.
17 Q. Okay. We are done with that exhibit. Let's
18 move on to Exhibit 7.
19 (Ellis Exhibit Number 7, ErrorPatrol Screen
20 Shots, was marked for identification.)
21 BY MR. ARENSON:
22 Q. Mr. Ellis, I promise this is the last exhibit on
23 ErrorPatrol.
24 A. Are you sure? I'm going to hold you to that.
25 Q. You can. We have talked quite a bit about

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1 ErrorPatrol.
2 MS. GURLAND: Before we get started, same
3 objection, lack of foundation and improper methodology
4 to any discussion of this exhibit.
5 BY MR. ARENSON:
6 Q. This is a screen shot of what happens when you
7 try to shut down a computer with ErrorPatrolFree
8 installed on it. Did you attempt do this during your
9 testing?
10 A. I believe I did.
11 Q. Did you get this window?
12 A. Yeah. And I believe I was able to dismiss it
13 and just shut down.
14 Q. Okay. So this would be another difference
15 between the paid version and the free version of
16 ErrorPatrol that wasn't mentioned in your report; right?
17 A. This would fall under the category that I did
18 mention that there is a difference in that it tells you
19 that you need to repair and shut down and -- or that you
20 need to repair, and it is -- again, it was my oversight
21 not to attach that document as an attachment. It was my
22 intention to do so.
23 MS. GURLAND: When you say "that document," are
24 you talking --
25 THE WITNESS: The one with the screen shots.

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1 The document that I prepared where I had screen shots,
2 and this was in there, and I believe there was some
3 commentary in that document as well as to what was
4 going on.
5 MS. GURLAND: And, for the record, is it the
6 screen shots taken throughout the analysis process that
7 show functionality of the software? Is that what you
8 are talking about?
9 THE WITNESS: Yes.
10 MS. GURLAND: And is that in materials that you
11 used in coming up with your report?
12 THE WITNESS: Yes.
13 MS. GURLAND: Okay. And do you believe that
14 that material has been otherwise provided to the Federal
15 Trade Commission?
16 THE WITNESS: Yes.
17 BY MR. ARENSON:
18 Q. So let's take a look at this error message, and
19 this -- let's start with some foundation.
20 So when you shut down the computer, this is the
21 error message that you saw?
22 A. Yes.
23 Q. Okay.
24 A. To my recollection, that is what I saw, and, to
25 my recollection, that is in my document.

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1 Q. Okay. Now, this error message says, "Shutting
2 down your computer is strongly not recommended since
3 your computer has 287 severe system errors. If you shut
4 your computer down while it has errors in the registry
5 database or file system, it is very likely that further
6 problems, such as" -- and then there is our list that we
7 have talked about many, many times, lost documents,
8 etcetera.
9 Now, is it your belief that shutting down a
10 computer with the registry keys that we have talked
11 about and the prefetch files that we have talked about
12 would result in lost documents, physical data loss,
13 system not starting up, and system slowdowns, crashes,
14 and freezes?
15 A. Well, as I have been saying all along, I believe
16 that the software is rather agnostic as to what exactly
17 the registry keys are. It seems to know what areas need
18 to be kept clean, and certainly if the right
19 circumstances were in play -- I don't think it is the
20 intent of any software cleaning tool to be used on a
21 fresh install.
22 What I really kind of imagine myself doing and
23 envisioned doing was getting a computer and infecting it
24 and doing mean things to it and then running the
25 software and seeing what would happen. And to that

55 (Pages 217 to 220)

<p style="text-align: right;">221</p> <p>1 effect, had I done that, I do believe that I could have 2 created a circumstance on the computer where shutting it 3 down would have been a bad idea. 4 That being said -- I wanted to qualify my answer 5 with that. That being said, on a brand-new PC with the 6 stuff that we have seen, no. 7 MS. GURLAND: Do we know? Because we don't know 8 anything about any of this testing -- 9 MR. ARENSON: Carolyn, are you asking the 10 witness a question? 11 MS. GURLAND: I'm clarifying for the record, 12 since we are working now with some test that somebody 13 did in their office that I have no idea about, nor does 14 the witness, I'm asking -- because the witness has said 15 it is important to him to know whether or not this is on 16 a clean install of the software, but I think that the 17 witness is -- has not even been told or doesn't know 18 from what he is looking at what happened with this test. 19 MR. ARENSON: That's quite a speaking objection, 20 and I think you got it out. 21 MS. GURLAND: It is. 22 MR. ARENSON: So let's continue. 23 BY MR. ARENSON: 24 Q. So how would shutting down a computer cause lost 25 documents or physical data loss?</p>	<p style="text-align: right;">223</p> <p>1 isn't saying shutting down your system -- 2 Q. I think it is. 3 A. It is not saying if you shut down your system 4 right now, you will lose documents, you will lose 5 physical data loss, your system will not restart, it 6 will crash. It is not saying that. It is saying that 7 if you have -- if you shut down while it has errors in 8 the registry base or the file system, it is likely it 9 could cause it to occur, which is a true statement. 10 Q. In all instances? 11 A. In all instances if you shut your computer down 12 while it has errors in the registry database or file 13 system, these things could happen depending on what 14 those errors are. 15 Q. Well, we've talked about ErrorPatrol detects 16 errors on a clean install of Windows XP, right? So 17 every time you shut down Windows XP, even minutes after 18 you have installed it for the first time, is it very 19 likely that you are going to experience lost documents, 20 physical data loss, system not starting up, or system 21 slowdowns? 22 A. I have had that happen to me so I can't answer 23 that. That has happened to me; that it has been a 24 brand-new install of Windows XP and I went to restart it 25 and it failed. And I don't know why it failed. I don't</p>
<p style="text-align: right;">222</p> <p>1 A. If the registry had enough problems in it where 2 it had a virus or it had an item in the startup that 3 shouldn't be there, you might not be able to restart 4 your computer. If your hard drive were completely full, 5 for example, you may have trouble restarting your hard 6 drive, definitely. 7 Q. But ErrorPatrol doesn't detect viruses, does it? 8 A. No. But it detects invalid registry entries 9 which could have been put there by viruses, so to that 10 extent. I'm not sure -- and, again, this is something 11 that would require further testing and I would be happy 12 to do that. 13 Q. If it is the case that every time you shut down 14 a computer with ErrorPatrolFree on it you get this 15 message, you would agree with me that there would be 16 instances where that would be not true? This is one 17 example. 18 A. I'm not sure I caught the entire question. 19 Q. If it is the fact that this error message 20 appears every time you attempt to shut down a computer 21 that has ErrorPatrolFree installed, isn't it the case 22 that this message would be displayed at times when it 23 wasn't true? 24 A. I don't think it is -- this is making any 25 statement of truth. It is not saying -- the statement</p>	<p style="text-align: right;">224</p> <p>1 know if there was some error in the registry or if some 2 portion of the registry offloaded into the RAM 3 incorrectly. I don't know. 4 Q. Do you think as an expert you would probably 5 know if a lot of people -- it very likely would indicate 6 if a lot of people experience this, right? 7 Do you think as an expert you would be aware if 8 a fresh install of Windows XP could never be booted up 9 again and that routinely happens? Don't you think 10 that's something you would probably know about? 11 A. Sure, I would know about that. Not until I 12 tried to reboot the machine though. 13 Q. Is there a epidemic of people in installing 14 Windows XP and then never being able to boot up their 15 computer again? 16 A. Well, there was an epidemic of that actually at 17 the time. The Sasser virus definitely. Brand-new PCs 18 out of box plugged into the Internet would get the 19 message, the RPC service has entered a stop state and 20 your computer is shutting down and you would not be able 21 to get that computer to restart again. So that would 22 happen. 23 And that's not to say that that's what this is 24 talking about here, but certainly there were enough 25 problems with Windows XP that that's why I -- I think</p>

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1 that's what spawned all of these products, because there
 2 were problems. It was inherently flawed. It was very
 3 buggy.
 4 **Q. So let me ask it this way: On a clean install**
 5 **of Windows XP on a VM machine not attached to the**
 6 **Internet, you agree with me that this same system**
 7 **error-found message would be displayed? In fact, it was**
 8 **displayed on your image; right?**
 9 A. Yeah.
 10 **Q. And in that case, on a clean VM image, is the**
 11 **statement that you -- if you shut your computer down**
 12 **while it has errors in the registry database that it's**
 13 **very likely you would have lost documents, physical data**
 14 **loss, system not starting up, and system slowdowns? In**
 15 **that case was that an accurate statement?**
 16 A. If we are talking about the particular system --
 17 I can't say that I would be sure what had caused the
 18 registry errors without looking at it. But you are
 19 talking about the registry errors that we saw -- and I
 20 don't think that's really an ideal state either, to talk
 21 about a VM not connected to the Internet. That's not --
 22 that's like a laboratory experiment. That's not like a
 23 real-world situation where users are doing that --
 24 **Q. I understand your views.**
 25 A. -- and then running it.

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1 **Q. But you have to answer my question at the end of**
 2 **the day. You have qualified it but now can you**
 3 **answer it?**
 4 A. In that particular laboratory environment, no.
 5 **Q. Okay. Let's move on.**
 6 **We are now going to talk about DriveCleaner.**
 7 **Now, you tested the paid version of DriveCleaner, not**
 8 **the free version; is that right?**
 9 A. I'll take your word for it.
 10 **Q. I don't want you to take my word for it. You**
 11 **take a look at your report and let me know.**
 12 A. Yes. I tested the DriveCleaner2007 paid
 13 version.
 14 **Q. If you had seen the differences between paid and**
 15 **free versions of ErrorPatrol, do you think it is**
 16 **important to test the free version of DriveCleaner in**
 17 **addition to the paid version?**
 18 A. Yes.
 19 **Q. In your report you state that DriveCleaner is**
 20 **similar to products endorsed by the federal government;**
 21 **right?**
 22 A. Yes.
 23 **Q. And that statement, is that based entirely on**
 24 **your review of OnGuard Online, an Internet website, or**
 25 **are there other bases for your statement that the**

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1 **federal government has endorsed DriveCleaner -- or I**
 2 **should say products similar to DriveCleaner?**
 3 A. Yes. That's from that website, which I believe
 4 onguardonline.gov is a site that is maintained -- and
 5 when I say "maintained," in that they receive
 6 significant contributions from a number of governmental
 7 entities. So whether or not that means that they are
 8 endorsed -- did I use the word "endorsed"?
 9 **Q. You do.**
 10 A. Or recommended?
 11 **Q. I think you say "endorsed," but if I'm wrong,**
 12 **let me know.**
 13 A. Yeah. And I think I'm probably making the
 14 assumption that the fact that the government contributes
 15 money to those entities that it is endorsing those
 16 activities.
 17 **Q. For the record, on page 10 of your report you**
 18 **say -- are you with me -- "endorsed by the federal**
 19 **government"?**
 20 A. Yeah, I saw that.
 21 **Q. Okay. So the sole basis of that statement was**
 22 **your review of OnGuard Online; right?**
 23 A. Yes.
 24 **Q. Okay. Let's take a look --**
 25 A. And I'm not actually sure that CCleaner was on

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1 that site. That might have been -- I don't remember
 2 seeing --
 3 **Q. We'll learn in a minute that none of those**
 4 **products are on that site.**
 5 **(Ellis Exhibit Number 8, OnGuard Online Screen**
 6 **Shots, was marked for identification.)**
 7 BY MR. ARENSON:
 8 **Q. What I did -- because I was a little bit**
 9 **confused by this and I had not previously heard about**
 10 **the federal government endorsing software programs -- I**
 11 **searched OnGuard Online and actually looked at every**
 12 **page on it as well, but I tried to use the search**
 13 **function, trying to find any reference to any of these**
 14 **products, and I couldn't find any reference to them.**
 15 A. Okay.
 16 **Q. What I did find was a page on OnGuard Online,**
 17 **which is page 4 -- you are with me?**
 18 A. Okay.
 19 **Q. Which says -- is a link to another site to find**
 20 **software and applications. Do you remember seeing this**
 21 **page? Is this the link that you followed?**
 22 A. This looks familiar.
 23 **Q. So you clicked on this link and that would have**
 24 **taken you to a third-party site called GetNetWise; does**
 25 **that look familiar?**

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1 A. Yeah. It is the Internet Education Foundation's
 2 website, and I believe that's the OnGuard Online.
 3 **Q. Actually, I will tell you that GetNetWise has no**
 4 **affiliation with the federal government.**
 5 A. Okay. So if you would like to redact that
 6 portion of my --
 7 **Q. Wait. There is more.**
 8 A. All right.
 9 **Q. So next page there is actually a disclaimer on**
 10 **the OnGuard Online website and let me read it to you.**
 11 A. Okay.
 12 **Q. "Further, the inclusion of links to particular**
 13 **items in hypertext is not intended to reflect their**
 14 **importance nor is it intended to endorse any views**
 15 **expressed or products or services offered on these**
 16 **outside sites."**
 17 **That's the disclaimer that exists on OnGuard**
 18 **Online. Now, there is a further disclaimer once you get**
 19 **to GetNetWise. If you click on any of these programs --**
 20 **and this is the last page -- GetNetWise, which is a**
 21 **third-party site unaffiliated with the federal**
 22 **government itself says, "We have provided links to**
 23 **resources that we hope will be helpful to you but,**
 24 **remember, GetNetWise cannot vouch for their content."**
 25 **So you have actually got two levels of**

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1 disclaimers here, right? The federal government is
 2 saying we are not endorsing this stuff, and then a third
 3 party is also saying we are not endorsing this stuff.
 4 A. Okay.
 5 **Q. So knowing what you know now, you would take**
 6 **back the statement that the federal government endorses**
 7 **these products; right?**
 8 A. I would probably refine my language, yes. I
 9 would -- I would certainly refine my language.
 10 **Q. How would you refine it?**
 11 A. Just to say that the federal government does
 12 fund the site. It does support links to these software
 13 tools, and that's the truth, as they are doing that, and
 14 they are linked.
 15 **Q. I think it is close. The federal government**
 16 **funds a site that links to another site which, in turn,**
 17 **links to a third-party site that has the software.**
 18 A. Yeah. That would be fair.
 19 **Q. Okay.**
 20 A. Yeah, I agree.
 21 **Q. Okay. So the federal government has never**
 22 **endorsed Privacy Guardian, Acronis Privacy Expert Suite,**
 23 **or CCleaner?**
 24 A. I can't say to what extent these softwares are
 25 installed on government computers, but I assume there

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1 are tools that are used within government organizations,
 2 and that does indicate their endorsement. But that
 3 would be a --
 4 **Q. Speculation.**
 5 A. Yes, thank you. That would be speculation.
 6 **Q. So, as far as you know, based on your personal**
 7 **knowledge, the federal government doesn't endorse the**
 8 **three products I just talked about, Privacy Guardian,**
 9 **Acronis Privacy Expert, or CCleaner.**
 10 A. Yes.
 11 **Q. Yes, correct?**
 12 A. Correct.
 13 MR. ARENSON: Why don't we take a quick break.
 14 We are making good time. Why don't we take five minutes
 15 and get things organized and that will speed things up.
 16 (A brief recess was taken.)
 17 MR. ARENSON: Okay. Back on the record. I'm
 18 going to introduce Exhibit 9.
 19 (Ellis Exhibit Number 9, PerformanceOptimizer
 20 Screen Shots, was marked for identification.)
 21 BY MR. ARENSON:
 22 **Q. These are screen shots from a**
 23 **PerformanceOptimizer program which you tested; correct,**
 24 **Mr. Ellis?**
 25 MS. GURLAND: Are these his screen shots?

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1 MR. ARENSON: No. We don't actually have his
 2 screen shots, at least not here. His report doesn't
 3 have any.
 4 BY MR. ARENSON:
 5 **Q. Do you recognize these?**
 6 A. No, I don't. And, again, I would have to say
 7 that -- I mean, it comes back down to the question of
 8 forensics, right? Without having done the forensics or
 9 seeing a forensic report with some descriptions of
 10 what's going on and what other tests we are running,
 11 something really comprehensive, it gets difficult for me
 12 to make comments about these sorts of things.
 13 **Q. Did you talk to counsel at the break, Mr. Ellis?**
 14 A. Yes.
 15 **Q. What did you guys talk about?**
 16 A. We talked about sticking to what I -- sticking
 17 to my guns when it comes to forensics.
 18 **Q. Why don't you tell me what Carolyn said and what**
 19 **Mr. Webb said and what was the conversation?**
 20 A. The conversation was if I don't feel the
 21 forensics are there, and I don't, and I have said that
 22 before, that I should mention that.
 23 **Q. Okay. So Carolyn told you that?**
 24 A. She didn't give me the words that I said, no.
 25 She suggested that I be honest and stick to my guns and

<p style="text-align: right;">233</p> <p>1 remember that I'm a forensics analyst.</p> <p>2 Q. So you don't have any recollection of what</p> <p>3 PerformanceOptimizer looked like?</p> <p>4 A. I do but I don't have any recollection of</p> <p>5 exactly how many files it found or --</p> <p>6 Q. Presumably it would be easy for you to verify</p> <p>7 since you tested the program.</p> <p>8 A. Sure, it would be.</p> <p>9 Q. So in this screen shot of PerformanceOptimizer,</p> <p>10 there are 57 severe errors detected on the computer; do</p> <p>11 you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And what we have done here in the attachments is</p> <p>14 print out the list of what was actually detected by</p> <p>15 PerformanceOptimizer.</p> <p>16 MS. GURLAND: I would like to just -- sorry, I</p> <p>17 don't want to make the whole speaking objection. I</p> <p>18 renew the objection to every time there is a test being</p> <p>19 conducted by counsel in the case.</p> <p>20 MR. ARENSON: Well, I think Mr. Ellis made your</p> <p>21 objection for you so I think we're all good.</p> <p>22 BY MR. ARENSON:</p> <p>23 Q. This is a printout easily verifiable by you,</p> <p>24 right, because you could look at the screen shots that</p> <p>25 you did. Simple to verify; right?</p>	<p style="text-align: right;">235</p> <p>1 A. No, I couldn't tell you this exact -- all I can</p> <p>2 tell you it says missing or invalid application path</p> <p>3 entry and the assumption is that the -- the application</p> <p>4 that it is referring to doesn't actually -- is actually</p> <p>5 invalid and doesn't exist in that location.</p> <p>6 Q. What about the next one?</p> <p>7 A. It would be the same answer.</p> <p>8 Q. So for all of these would it be the same answer?</p> <p>9 A. Wherever it says missing or invalid path.</p> <p>10 Q. Why don't you take a look. I think it says that</p> <p>11 for all of them.</p> <p>12 A. Yes.</p> <p>13 Q. So you don't know what any of these registry</p> <p>14 keys do.</p> <p>15 A. I would have to research them to find out</p> <p>16 exactly. My initial impression is that they have to do</p> <p>17 with setup and install of Windows.</p> <p>18 Q. Okay.</p> <p>19 A. And they refer to files -- the files that were</p> <p>20 removed after the installation.</p> <p>21 Q. You had a very succinct explanation of what the</p> <p>22 registry keys protected by ErrorPatrol did.</p> <p>23 A. Yeah, I knew those.</p> <p>24 Q. But you don't know these.</p> <p>25 A. I haven't look into these. I haven't examined</p>
<p style="text-align: right;">234</p> <p>1 A. Sure.</p> <p>2 Q. And you tested this exact program; right?</p> <p>3 A. Yes. Again, I'm not being provided with an MD5</p> <p>4 hash. I don't know that I tested the exact same one.</p> <p>5 If you can tell me that you ran an MD5 hash against the</p> <p>6 software for PerformanceOptimizerFreeSetup and that you</p> <p>7 came up with this exact same MD5 hash as the software</p> <p>8 that I tested, I would agree, yes.</p> <p>9 Q. Fair enough. But it would be very simple for</p> <p>10 you to verify the results; right?</p> <p>11 A. Assuming you can provide me with the MD5 hash</p> <p>12 and the software that you used.</p> <p>13 Q. Or you could just take the results and compare</p> <p>14 them to the results you got and compare the two.</p> <p>15 A. Yes, I could.</p> <p>16 Q. Simple, right?</p> <p>17 A. Yeah.</p> <p>18 Q. Let's look at the results that</p> <p>19 PerformanceOptimizer detected, and they are in -- keep</p> <p>20 going one more page to the actual list.</p> <p>21 A. Yes.</p> <p>22 Q. So they are categorized as medium and high-level</p> <p>23 threats. Let's jump to the high-level threats.</p> <p>24 Can you tell me what this registry key that</p> <p>25 PerformanceOptimizer is detecting is and what it does?</p>	<p style="text-align: right;">236</p> <p>1 these particular keys. That would be an oversight on my</p> <p>2 part, and I would definitely want to go back and do</p> <p>3 that. It is probable and likely that I did research</p> <p>4 these at the time of my examination, and I simply don't</p> <p>5 recall exactly what I came across. There was a lot of</p> <p>6 different things that I looked at.</p> <p>7 Q. Okay. But standing here today, if you don't</p> <p>8 know what these registry keys do, how do you know that</p> <p>9 they are severe system errors?</p> <p>10 A. I would want to reserve judgment on that.</p> <p>11 Q. Okay. And how would you have known at the time</p> <p>12 that you wrote your report that they were severe system</p> <p>13 errors?</p> <p>14 A. I'd have to look at my report and see what</p> <p>15 conclusions I came to about those.</p> <p>16 Q. Sure. It is page 15 of your report.</p> <p>17 MS. GURLAND: Are you asking him what</p> <p>18 conclusions he came to the tests that you ran in your</p> <p>19 office?</p> <p>20 MR. ARENSON: Carolyn, your objections are</p> <p>21 entirely inappropriate. Let's keep moving.</p> <p>22 BY MR. ARENSON:</p> <p>23 Q. Page 15 of your report. You say,</p> <p>24 "PerformanceOptimizer does detect" -- I think that's a</p> <p>25 typo there -- "are generally considered items that</p>

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1 should be removed from the system."

2 So maybe the better question is, you actually
3 don't go as far as PerformanceOptimizer does.
4 PerformanceOptimizer says these are severe system errors
5 and it says system errors may lead to corrupted files,
6 permanent data loss, system startup failure, and loss of
7 documents.

8 And in your report, to be fair, you don't say
9 any of that. All you say is that PerformanceOptimizer
10 does detect are generally considered items that should
11 be removed from the system.

12 I guess my first question is, do you agree with
13 PerformanceOptimizer, that these are severe system
14 errors that could -- I should say may lead to the four
15 categories that are described on the page?

16 A. I would say that while not knowing what these
17 specific keys refer to, I would say that missing or
18 invalid com and activeX information could lead to
19 problems when you are attempting to do certain things on
20 the Internet.

21 **Q. Can you give me an example?**

22 A. Well, if you had a reference to an activeX
23 object that didn't actually exist on the system and then
24 something such as a -- you know, the Internet Explorer
25 were to read the registry and say, oh, hey, this exists

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1 and then it goes to look for it and it's not there, you
2 might get -- you would have problems.

3 **Q. Now --**

4 A. But that being said, I don't know exactly which
5 ones these are or if this is a security -- a
6 vulnerability problem with Windows not cleaning up after
7 itself and just, again, contributes to the sum total of
8 problems that you can have with your registry.

9 **Q. Well, this is a test of a clean VMWare image,
10 and I assume yours was the same, is it not?**

11 A. Yes.

12 **Q. So if it turns out that you detected the exact
13 same errors on your VM machine -- which I think we'll
14 find that you did --**

15 A. Sure.

16 **Q. -- then that would indicate that all Windows XP
17 versions have these errors; right? Installs?**

18 A. All fresh installs. I think there is certainly
19 options and things that you can do when you are
20 installing Windows that may effect that. Not sure
21 exactly. I'm speculating.

22 **Q. So if every install of Windows XP has these
23 errors, anyone that ran PerformanceOptimizer would get
24 these same messages; correct?**

25 A. Yes.

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1 **Q. So any XP system that hadn't altered these
2 registry keys, was a base install that hadn't altered
3 these registry keys --**

4 A. Was this Service Pack 1 or Service Pack 2, do
5 you know?

6 **Q. SP2. And were you on Service Pack 2 as well?**

7 A. Yes.

8 **Q. And, again, I encourage you to verify the
9 findings. Every installation of XP that hadn't taken
10 affirmative steps to change these registry keys would
11 get the same warning from PerformanceOptimizer; correct?**

12 A. Yeah. And I would have to test to see if other
13 software -- I would have to find out exactly why these
14 are a problem. They very well may be a problem. They
15 may very well be an example of something existing that
16 given enough of it or given the right circumstances, the
17 existence of this can be a problem.

18 All through the history of Windows, uninstalling
19 software can create eventual performance problems with
20 your computer because of items that get left behind in
21 the registry because of pieces that get left behind that
22 really shouldn't be there.

23 **Q. But this is a fresh install of Windows so no
24 program should have been installed. And that's what you
25 tested; right?**

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1 A. No. Windows XP, as I mentioned before, is a
2 conglomerate of a bunch of different software, and
3 during the installation process things are installed
4 that have a certain purpose and then they are
5 uninstalled, and the registry is used during the
6 installation process to perform certain functions to set
7 up things in a certain way and then those things go away
8 or they are deleted, such as setup files and things
9 likes that. It is a very complex environment.

10 **Q. Have you removed these registry keys from your
11 wife's computer?**

12 A. I think -- no.

13 **Q. And while you owned that computer did you remove
14 these registry keys?**

15 A. I believe that I have run CCleaner on that
16 computer so they may be removed. Now that I think about
17 it, I -- there is a high degree of certainty that
18 CCleaner has been run on that machine and that -- I
19 would have to check to see if CCleaner cleans these out,
20 but I do run tools that are designed to clean up things
21 like this.

22 **Q. So you are not sure whether these keys exist
23 or not.**

24 A. No. Not on her computer, no, or my own. Again,
25 the shoemaker's son has no shoes.

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<p>1 Q. Did these keys exist in Windows Vista and 2 Windows 7? 3 A. I don't know. 4 Q. Have you checked your install of Windows 7 to 5 see if these registry keys exist? 6 A. No, but I would be happy to do so. 7 Q. What about your work computer? Have you checked 8 on your work computer to see if these registry keys 9 exist? 10 A. Again, that's not my responsibility. We are a 11 team at kCura in every sense of the word and people have 12 their jobs to do and I trust them to do it until my 13 computer breaks. 14 Q. Okay. We are done with that one, and we'll move 15 on to Exhibit 10. 16 (Ellis Exhibit Number 10, WinFixer Screen Shots, 17 was marked for identification.) 18 BY MR. ARENSON: 19 Q. Okay. Now we are talking WinFixer, and you 20 tested the paid version of WinFixer, as I recall; is 21 that correct? 22 A. Yes. 23 Q. Go ahead and look. Don't take my word for it 24 but I want to make sure. It is the last entry. 25 A. WinFixer, right.</p>	<p>1 my report. 2 Q. Okay. Back to my original question. Did you 3 see this error message when you were testing the paid 4 version of WinFixer? 5 A. No, I don't believe that I -- no, that would not 6 have showed up on the paid version, because it has 7 already been registered so it wouldn't have come up. 8 Q. All right. Now, if you flip to page 2, you get 9 a system analysis result and these -- if you want to do 10 the math, the 113 severe system threats detected on the 11 first page are listed here. 12 A. Okay. 13 Q. One more page, that just expands the cookies 14 section? 15 A. Uh-huh. 16 Q. Let's not jump ahead. 17 A. Yes. 18 Q. So we have expanded the cookie section, and the 19 cookie being detected here is temp@jp.winfixer[2].txt. 20 Now, this is a file that was created during the 21 installation of WinFixerFree. Is this a severe system 22 threat? 23 A. I didn't see that, but, again, that falls under 24 the category of where if you had enough of them and if 25 it were -- you know, it certainly could represent a</p>
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<p>1 Q. You tested the paid version of WinFixer; right? 2 A. Yes. That's correct. 3 Q. In your testing of the paid version of WinFixer, 4 did you see this error message box? 5 A. I do recall that I -- yeah, I believe I 6 mentioned that there was the -- you know, the popup that 7 says that you need to click repair to register the 8 application and fix all the errors. And, again, this 9 exhibit is something you did on your computer? 10 Q. Well, let's look on your report. I'm not trying 11 to ambush you. Why don't you read over what you wrote 12 about WinFixer and maybe we'll be in a better spot. 13 MS. GURLAND: While he's examining it, I'd like 14 to renew my same objection that I have to every single 15 one of these exhibits. On the record, I object to 16 Exhibit 10 on the same basis. 17 A. I don't believe I tested the WinFixer -- I 18 recall having tested it, yeah. 19 BY MR. ARENSON: 20 Q. You know, I want you to be in the position to 21 testify, so why don't you read over your report and let 22 me know when you are ready. 23 A. Yeah. I make no mention here of a free version, 24 so that would be something that I would want to come 25 back to. I would want to do that examination and append</p>	<p>1 threat to your computer where personal information could 2 be captured and read by people that you don't want to 3 see that information, which some people would consider a 4 threat. Many people would consider it a threat. 5 Q. Does it concern you at all that WinFixer is 6 installing a file on the computer and then detecting a 7 file that it installed as a severe system threat? Does 8 that trouble you? 9 A. It is not -- it is not -- it is not the best 10 software practice to leave stuff behind and not know 11 that it is there. I could not speak to whether or not 12 that was intentional, that somebody left that behind for 13 the purpose of doing that. I couldn't speak to the 14 motive or the reason why it is there without doing an 15 analysis and finding out how that ended up there 16 and why. 17 Q. I encourage you to do that analysis. 18 Mr. Johnson tested this file and it is available to you 19 on the hard drive that you have. 20 A. Sure. 21 Q. But speaking in general terms, a security 22 product that creates a file that is then detected as a 23 severe system threat, does that trouble you? Or is that 24 not a practice that troubles you? 25 A. It is troublesome.</p>

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Q. And we have talked about whether cookies are severe system threats previously, and I don't want to rehash all that testimony.

A. Thank you.

Q. Is it safe to say that your opinions on whether cookies are severe system threats wouldn't have changed since the last product we talked about?

A. Yeah, it is safe to say that my opinion hasn't changed in last hour or two.

Q. Okay.

A. I certainly do want to do more analysis on -- and find the reports that I do recall having read at the time about the problem nature of cookies. I would want to find that and review that and provide that.

Q. Okay. Now, if you look at the last two pages of this -- I'm sorry, not the last page but the two pages before that. Keep going. One more. Okay?

A. Yes.

Q. Now we have listed again all of the registry keys detected by this program as severe system threats. What do these registry keys do?

A. Well, they are IDs for classes of software, so they are referring to -- you know, they appear to be, you know, keys and IDs for programs or for classes of software.

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registry keys in -- because certainly VMWare does install things on the local machine so that it can communicate with it, otherwise it is just a file on a computer. So VMWare does have a certain amount of interaction with the install, and I would want to make sure that this wasn't something that was caused by the VMWare.

Q. Okay. I would encourage you to undertake those tests.

Can you point me to any authoritative source, a treatise, manual, any other expert, that recommends that these registry keys be removed from Windows XP?

A. I think that I could probably find something with respect to application development where it talks about how a -- good-housekeeping in so far as when software's uninstalled, registry items should be removed and not left behind. I could probably find that for you very easily.

Q. Let me ask a better question.

Can you point me to any authority that defines these registry keys as sever system threats that are very likely to create lost documents, physical data loss, system not starting up, system slowdowns, crashes, and freezes?

A. To the degree that we have had conversations

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Q. Do you know what they do?

A. I would have to look into that. I don't know exactly what these particular ones do. I do know throughout the registry there is areas in the registry where items use keys like these to link to other areas of the registry, and the purpose of a software like that is to chain through those references and make sure the chains are complete. And incomplete chains with orphan records, they are generally not a good thing to have on your computer. But, again, I would want to look more into these and provide you a detailed explanation as to exactly what these do before I were to give any forensic opinion on the nature of these and whether they can cause damage or not and to what degree of damage they would cause, other than to say they are there and they shouldn't be and they lack references and they're orphan records.

Q. And do you know whether these ship with every copy of XP that leaves the factory?

A. No, I don't. But I think that that's a reasonable assumption to make; that if this -- if this was done on a Windows XP -- on a copy of Windows XP that was fresh out of the box, Service Pack 2, on a VM not connected to the Internet with no additional software installed, and if the VMWare itself didn't put these

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today already suggesting that when there is too many of these, the registry can become a burdensome item for Windows to manage because there is only a set amount of memory that Windows is ever going to give to the registry, and when it exceeds that, it becomes problematic because then it has to page out a lot of the entries.

And garbage in, garbage out. If you are getting a lot of garbage into the registry when it is reading certain areas, it could overwhelm it and cause a slowdown on the machine.

Q. So that would be in the case --

A. But these particular 50 or so entries by themselves causing a problem, no, not yet, but it would eventually contribute to the problem as it grows over time.

Q. So when WinFixer2005 says these are severe system threats that are very likely to create lost documents, etcetera, etcetera, based on this install, that's not true.

A. Well, if somebody punches me once, it is not going to hurt that bad, but if they punch me 40 times, it is going to be pretty bad.

I think that's really what they are talking about, is -- you know, they are warning you, hey, this

<p style="text-align: right;">249</p> <p>1 is a slap in the face, get rid of it, stop it from 2 happening, let's clean it up. So as far as it being a 3 system threat, certainly it is one of the straws on the 4 camel's back. 5 Q. So every version of Windows XP right out of the 6 box is very likely to experience lost documents, 7 physical data loss, system not starting up, and system 8 slowdowns as a result of these registry keys. 9 A. Again, I don't know exactly how these registry 10 keys -- what they are from, and I would want to examine 11 the machine, the VM, as it is being -- 12 Q. That's fair. Let's assume that you undertake 13 that test and you get the same results -- 14 A. Right. And earlier today we talked about my 15 opinions and how I might formulate new opinions. I just 16 formulated one, because I do know that the VM does have 17 interaction with the guest operating system, and to the 18 extent the VMWare does that, that's something new that I 19 thought up this afternoon that I hadn't given a lot of 20 thought to. 21 But since I work with a VM on a daily basis now, 22 it is something that I have noticed more and more, that 23 there is an interaction there that needs to be explored 24 to find out if these are, in fact, part and parcel of 25 that. I would want to eliminate that from -- I would</p>	<p style="text-align: right;">251</p> <p>1 this point. 2 A. It is safe to say I don't know the answer at 3 this point. 4 Q. Last question on WinFixer, last page. This 5 error message looks familiar. This is the error message 6 you get when you try to shut down a computer with 7 WinFixerFree installed. And, again, the error is if you 8 shut down your computer while it has errors in the 9 registry database or file system, it is very likely 10 you'll have further problems, such as lost documents, 11 physical data loss, system not starting up, system 12 slowdowns. 13 Now, is that the case in this instance on a 14 clean VM image? 15 A. Again, I'm going to have to say I don't know and 16 I want to explore this further because of the issues 17 with these particular entries. Because these could have 18 something to do with a driver that failed to install or 19 installed incorrectly. 20 And to give you a little anecdotal story about 21 that -- and it is a little embarrassing for me to tell 22 this story but I think it is relevant -- and that's that 23 I was trying to install a driver on my Windows 7, 24 32-bit, machine and because I have -- you know, I had 25 several Windows 7 machines, I downloaded the 64-bit</p>
<p style="text-align: right;">250</p> <p>1 want to know whether or not these are actually on every 2 XP machine, and I would start by actually installing XP 3 on a fresh machine, not a VM, to see. 4 Q. Okay. 5 A. I think that would be the better approach. 6 Q. Okay. 7 A. I think we were doing VMs because that's what 8 they were doing, because it was what Kevin Johnson was 9 doing, and I didn't give that as much thought as I 10 should have; that perhaps using a VM is not the best 11 approach. 12 Q. But that was -- 13 A. Certainly you might get -- depending on the 14 hardware of the machine, you could get a whole set of 15 different classes. There could be a problem with a 16 drive. These could be as a result of a driver that 17 failed to install. There is so many things that could 18 be behind this. 19 Q. I understand. And -- 20 A. I don't want to tell you that these -- that 21 these are not all the straws on the camel's back because 22 they might be. If there is, in fact, a problem with a 23 driver or something like that and that's why these 24 didn't get installed, I wouldn't know. 25 Q. Is it safe to say you don't know the answer at</p>	<p style="text-align: right;">252</p> <p>1 driver for the machine and it let me install it. And 2 the computer was running and I was trying to get the 3 device to work and it wouldn't work and I restarted my 4 machine and it would not reboot. 5 Q. Understood. 6 A. And all the repair utilities, all the repair 7 disks, the boot disks, nothing would work. I thrashed 8 my machine at a very deep system level by doing that. 9 So I kind of want to explore it further. I 10 think we are just kind of -- I need to explore it 11 further. 12 Q. Sure. So did you remove these registry keys 13 from your wife's computer? 14 A. I haven't -- again, I haven't examined these. I 15 don't know if these exist on her computer or not. 16 Q. If they do, you haven't removed them though. 17 A. I don't know if they are there to be removed. I 18 don't know what causes these. If these were caused by a 19 problem of some sort with software or with the install 20 and I were -- and I were giving my wife's computer a 21 tune-up, I would run a piece of software, such as 22 CCleaner. This is something that I would look for. 23 Q. Okay. But you haven't -- 24 A. No, I haven't. I have run -- I believe I have 25 run CCleaner on her machine but haven't done it with the</p>

<p style="text-align: right;">253</p> <p>1 express intent of looking for these particular items. I</p> <p>2 have run it with the intent of cleaning out things, like</p> <p>3 the temporary files, the bad registry entries, and that</p> <p>4 sort of thing, so there you have it.</p> <p>5 Q. Okay. So in your testing of the paid version of</p> <p>6 WinFixer -- and this is 12 going on to 13 -- you</p> <p>7 indicate that the items that WinFixer does detect are</p> <p>8 generally considered items that should be removed from</p> <p>9 the system; right?</p> <p>10 A. Yeah. Invalid registry entries.</p> <p>11 Q. Now, if those items detected by the paid version</p> <p>12 are the same as the free version, the ones we just saw,</p> <p>13 you just told me, I think, that you are not sure whether</p> <p>14 those items should be removed or not; right?</p> <p>15 A. I said I'm not sure whether those items would</p> <p>16 cause a problem at restart. That's what I said.</p> <p>17 Q. I see. So you do believe they should be removed</p> <p>18 though?</p> <p>19 A. I do believe that invalid entries in the</p> <p>20 registry should be removed, yes.</p> <p>21 Q. Even though you don't know what they do.</p> <p>22 A. Again, it would depend on the software that I'm</p> <p>23 using to make that judgment, because I can't know</p> <p>24 everything about the registry. That's massive.</p> <p>25 Q. What's your basis for relying on WinFixer? You</p>	<p style="text-align: right;">255</p> <p>1 Q. See, but here's the issue. I think you are</p> <p>2 focused -- and I understand why -- on functionality,</p> <p>3 because you are testing software and you are focused on</p> <p>4 functionality. And as I understand your comparison to</p> <p>5 CCleaner, you are comparing the functionality of these</p> <p>6 products to the functionality of CCleaner. That's what</p> <p>7 the genesis of that chart is; is that right?</p> <p>8 A. Right.</p> <p>9 Q. Here's the problem. Does CCleaner indicate that</p> <p>10 what it's detecting are severe system threats that are</p> <p>11 very likely to cause lost documents, physical data loss,</p> <p>12 system not starting up, and system slowdowns?</p> <p>13 A. I couldn't tell you at this time.</p> <p>14 Q. I can tell you it didn't for me.</p> <p>15 So there is a difference between functionality</p> <p>16 and representations made to consumers. And as I</p> <p>17 understand your report, you are not making any judgments</p> <p>18 on the representations made to consumers. You are</p> <p>19 making judgments on the functionality of the product; is</p> <p>20 that fair?</p> <p>21 A. That's fair.</p> <p>22 Q. Okay. Let's go to your tests of WinAntivirus</p> <p>23 and WinAntispyware.</p> <p>24 A. Okay.</p> <p>25 Q. Now, you tested multiple versions of these</p>
<p style="text-align: right;">254</p> <p>1 wouldn't rely on just any piece of software, would you?</p> <p>2 A. I frequently do rely on software that I don't</p> <p>3 know much about, because it is -- I have a lot of faith</p> <p>4 in humanity.</p> <p>5 Q. Do you know the company that made WinFixer?</p> <p>6 A. I believe IMI made WinFixer.</p> <p>7 Q. Okay. Do you have a good opinion of IMI? You</p> <p>8 thing they produce trustworthy software?</p> <p>9 A. I think the software that I've tested that said</p> <p>10 it would do what it did, it did it. And WinFixer, you</p> <p>11 know, it does what it says it would do. It cleans out</p> <p>12 temporary Internet files. It cleans out temp files. It</p> <p>13 finds orphaned entries in the registry and cleans them</p> <p>14 out.</p> <p>15 And these are all things that -- if you look in</p> <p>16 my report on -- where I did a comparison to a piece of</p> <p>17 software called CCleaner, which is literally used -- it</p> <p>18 is a free tool and it's used by millions upon millions</p> <p>19 and millions of users -- I'm not sure I wrote down in</p> <p>20 here the number of downloads at the time but it was</p> <p>21 definitely in the millions of people that used the</p> <p>22 software, and I hear nothing but good things on the</p> <p>23 Internet and the message boards, people I know, people</p> <p>24 in the industry with me recommend CCleaner, and it does</p> <p>25 those things.</p>	<p style="text-align: right;">256</p> <p>1 programs and these are both -- unlike what we have</p> <p>2 talked about I think exclusively until now -- these are</p> <p>3 purported virus and spyware removers, right, not error</p> <p>4 detectors.</p> <p>5 A. Right.</p> <p>6 Q. Now, for WinAntispyware, you tested the paid</p> <p>7 version of that program; right?</p> <p>8 A. Yes.</p> <p>9 Q. And as I understand your test, you simply ran</p> <p>10 the program on a clean computer, didn't get any</p> <p>11 detections, and concluded that the program was</p> <p>12 functioning appropriately. Is that a fair summary of</p> <p>13 your test?</p> <p>14 A. No. I concluded that it wasn't finding false</p> <p>15 threats; that it wasn't indicating that there were</p> <p>16 threats that existed that didn't exist.</p> <p>17 Q. But based on your testing, you don't have any</p> <p>18 idea if WinAntispyware would actually detect spyware, do</p> <p>19 you?</p> <p>20 A. I don't believe I put spyware onto the computer</p> <p>21 and tested it. That should have been something I should</p> <p>22 have done.</p> <p>23 Q. Take a look at your report.</p> <p>24 A. I didn't.</p> <p>25 Q. So you -- at this point you don't have any idea</p>

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1 **whether the WinAntispyware would actually detect**
 2 **spyware, do you?**
 3 A. Yeah. I was looking more towards -- I don't
 4 believe I stated in here that it does what it said it
 5 would do. What I said is that it wasn't doing something
 6 that it didn't say it would do.
 7 Did you understand that?
 8 **Q. I actually understood that but I'm not sure --**
 9 A. That you will understand it later.
 10 **Q. -- that anyone else will months from now.**
 11 So is it fair to say that you can't say one way
 12 or the other whether WinAntispyware would actually
 13 detect spyware based on the testing that you have done?
 14 A. Based on my testing to date, I can't say that it
 15 would find -- all I can say is that I did notice that it
 16 was behaving in a way that one would expect a software
 17 to behave that was doing something. It was scanning
 18 areas of the computer. I was watching it do things,
 19 looking at things, etcetera.
 20 **Q. But, again, at the end of the day, based on your**
 21 **testing, you can't conclude at this point whether**
 22 **WinAntispyware would actually detect spyware.**
 23 A. No, not at this time.
 24 **Q. And can you explain how an antispyware product,**
 25 **such as WinAntispyware, would actually go about**

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1 **detecting spyware?**
 2 A. Yeah. It would look for executables that match,
 3 like a hash of a known like signature.
 4 **Q. So would there be a database of signatures?**
 5 A. Yeah. And that's my assumption, is that the
 6 enemies.dat would be that signature database, but I
 7 wasn't able to get into that file and actually read the
 8 entries to test and see.
 9 I tried. I made like a couple attempts to do
 10 it, and it came down to needing to decompile and I
 11 didn't have the tools readily available to do that.
 12 **Q. Okay.**
 13 A. But that was something kind of on my to-do list,
 14 but I had a limited amount of time to get this report
 15 prepared. If I had two years to do this, we would have
 16 a much thicker report.
 17 **Q. Understood. So you don't know how often that**
 18 **detection database was updated, do you?**
 19 A. No. I don't know how often that was going out
 20 and looking for -- I do recall seeing it making --
 21 attempting to make a connection to see if -- and I'm --
 22 but because there is no -- because the servers are all
 23 down now and there is no way for me to really know how
 24 often it would make that attempt, assuming that it -- it
 25 may say, hey, I made an attempt, I can't make an

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1 attempt, I will try again in 30 days or a day. I don't
 2 know.
 3 **Q. Actually I think we are talking about two**
 4 **different things and I don't mean to confuse you. But**
 5 **as I understand it -- and correct me if I'm wrong -- the**
 6 **detection database would be maintained by the company**
 7 **that created the software; right?**
 8 A. Yes. And it would ship with signatures to date,
 9 and then it would update it in the future.
 10 **Q. Right. And by updating, you mean the program**
 11 **would reach out and grab updates and pull them down to**
 12 **the machine.**
 13 A. Yeah, that's how it works.
 14 **Q. And what I'm talking about is the updates that**
 15 **would be stored on the server that the program is**
 16 **reaching out to, you don't know how often those updates**
 17 **were published for WinAntispyware, do you?**
 18 A. No, I don't.
 19 **Q. And you would agree with me that it would be**
 20 **important to regularly update antispyware definitions in**
 21 **order to keep up with the current threats.**
 22 A. Yes.
 23 **Q. So, again, based on your testing, you can't say**
 24 **whether WinAntispyware would be an effective antispyware**
 25 **product because you don't know whether the signature**

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1 **database was updated regularly.**
 2 A. No. And I don't believe I made that
 3 representation in my report.
 4 **Q. I'm not saying that you did.**
 5 A. Okay. At this time I don't know. I would
 6 certainly like to know. That's another item that I
 7 would like to -- would have liked to have explored
 8 further had I had more time.
 9 **Q. So when you say in your report -- and this is**
 10 **where we have a bit of an issue -- you said that**
 11 **WinAntispyware performs similarly to other antispyware**
 12 **and antimalware products of the same time period.**
 13 **Now, I don't think you've got enough information**
 14 **to make that decision. Do you disagree with me?**
 15 A. I think that when I'm talking about that, what
 16 I'm talking about is the areas where I was looking and
 17 areas of examination, because I was watching what it was
 18 doing while it was doing it using a process monitor. I
 19 could see what it was accessing, where it was going, and
 20 what it was doing, and I could observe that its
 21 functionality was not simply just to pop up a window
 22 that says your computer is not infected.
 23 It scanned the computer, and the assumption was
 24 that it was looking at something. I didn't go so far
 25 as -- you know, to crack the data stream and see that it

<p>261</p> <p>1 was hashing things and checking them against -- but I 2 did see it making frequents checks to the enemies.dat 3 file, which I assume -- that was an assumption, I will 4 admit -- that that file contained signatures. 5 Q. But isn't it true in order to know that 6 WinAntispyware performed similarly to other antispyware 7 and antimalware products, you would have to know things 8 that you don't, like how often the detection database 9 was updated? 10 A. I think I would just have to know that it could 11 find spyware that was on the computer in its signature 12 file. I think that that would satisfy me. 13 Q. But you don't know that. 14 A. And I don't know that and I would like to. 15 Q. So as of you sitting here today and when you 16 wrote your report, you don't really know whether 17 WinAntispyware performed similarly to other antispyware 18 and antimalware products. You need to do more research. 19 A. I need to do more research, yes. 20 Q. And you don't know whether it performed 21 similarly. 22 A. I know that it -- 23 Q. Let's focus on performs, I guess, because I 24 guess it depends on what you mean by that. 25 A. Operates, right? I guess I would say that it</p>	<p>263</p> <p>1 A. Okay. 2 MR. ARENSON: I'm going to mark this as the next 3 exhibit, 11. 4 (Ellis Exhibit Number 11, Westcoast Labs Report, 5 was marked for identification.) 6 BY MR. ARENSON: 7 Q. And this is a long report, and I wouldn't ask 8 you to read the whole thing. But if you turn to 9 page 11, this is an analysis of how Westcoast Labs 10 tested a variety of security products. Take a look. 11 Give it a glance and let me know when you are ready. 12 A. Okay. 13 Q. Okay. So here Westcoast Labs took a total of 14 156,587 unique files and tested them against all of 15 these security products to try to determine 16 effectiveness of the security products. 17 Now, you tested WinAntivirus against two files; 18 is that right? 19 A. Yes. 20 Q. And neither of those files were actually 21 malicious; right? 22 A. That's correct. 23 Q. You don't contend that your test is a serious 24 test of WinAntivirus's detection abilities. 25 A. I contend that it is not comprehensive -- it is</p>
<p>262</p> <p>1 operates similarly. Whether or not it performs as well, 2 I don't know. 3 Q. Okay. That's good. 4 So on to WinAntivirus, which was a different 5 type of test with WinAntivirus. For WinAntivirus, you 6 actually tested whether WinAntivirus could detect 7 anything on your computer by using two different threat 8 files; is that right? 9 A. That's correct. 10 Q. Okay. Now, these test files aren't malicious, 11 are they? 12 A. No. 13 Q. So you never actually tested if WinAntivirus 14 would detect a real malicious file, just the 15 nonmalicious test files. 16 A. No. It is not my practice or custom to download 17 actual live viruses to my computer. Number one, they 18 may -- it is dangerous to handle viruses, and, number 19 two, I'm not even sure if it is -- I'm not even sure if 20 it is legal. 21 Q. So I want to show you a report -- have you heard 22 of the organization called Westcoast Labs? 23 A. It is ringing a bell. 24 Q. They are a certification body for security 25 software.</p>	<p>264</p> <p>1 not as comprehensive as this test, but it is a serious 2 test designed to show that it -- at least the software 3 does recognize when a file is a virus. 4 Q. Well -- 5 A. At least that file. It found at least that 6 file. And, again, I certainly can't compete with your 7 time, you know, or resources with a fully 8 comprehensive -- and I certainly -- you know, that 9 certainly speaks to, you know -- I didn't see that -- I 10 didn't see that test done by Mr. Johnson either so -- 11 Q. But Mr. Johnson didn't -- 12 A. If Mr. Johnson had conducted a test and had 13 found that the software was saying that there were 14 viruses that were there and they were not, or if he had 15 conducted a test -- 16 So my goal was to mimic what the other people 17 were doing to at least run the same tests that they did 18 to see if I got the same results, and then to even take 19 it a step further and say, well, at least it does this 20 test virus, it finds this, so it is obviously smart 21 enough -- it is obviously checking all these files 22 against something and at least that virus definition is 23 in its virus database. 24 And it didn't seem likely to me that somebody 25 would just put that one test virus in there unless they</p>

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1 were actually doing, you know, real virus detection
 2 software development.
 3 **Q. But here's the difference between you and**
 4 **Mr. Johnson. You stated in your report that**
 5 **WinAntivirus offered similar features to those offered**
 6 **by the leading products in the industry.**
 7 **Were those your words?**
 8 A. Yes.
 9 **Q. Now, how could you possibly know that if you**
 10 **haven't conducted a rigorous test of its detection**
 11 **capabilities? And I assume the answers to my questions**
 12 **from before about the detection database are all the**
 13 **same.**
 14 MS. GURLAND: Can he answer?
 15 MR. ARENSON: Sure. Let me just finish my
 16 question. That'd be great.
 17 THE WITNESS: I'm sorry, who is objecting?
 18 MR. ARENSON: I'm not sure.
 19 MS. GURLAND: I just -- we had the question and
 20 then we were going to have both the question and the
 21 answer from Mr. Arenson, so I thought maybe at some
 22 point we should see whether or not Mr. Ellis agrees.
 23 MR. ARENSON: Sure. And if I can just ask my
 24 question, that'd be great.
 25 ///

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1 BY MR. ARENSON:
 2 **Q. So, again, back to my question. I assume and --**
 3 **let's make it easier for Ms. Gurland.**
 4 **Your answers for whether WinAntivirus, whether**
 5 **its detection database was updated on a daily or weekly**
 6 **or monthly basis, do you know the answers to those**
 7 **questions?**
 8 A. I don't know.
 9 **Q. Okay. So if you don't know how often the**
 10 **detection database was updated -- and I assume that**
 11 **that's an important fact in comparing antivirus**
 12 **products?**
 13 A. I believe it was making a check every time. I
 14 would want to come back to that, because I don't know if
 15 I wrote that down in here, but I did see these making
 16 attempts to access --
 17 **Q. We talked about the distinction between it**
 18 **making a check and what it is making a check for.**
 19 A. Right. And there is really no way to tell;
 20 right?
 21 **Q. Because you don't have the data.**
 22 A. Because the data is not there anymore.
 23 **Q. Exactly.**
 24 A. The servers aren't there anymore.
 25 **Q. Exactly right.**

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1 A. It is a forensic impossibility to make a
 2 determination about whether the software -- maybe the
 3 software only shipped with a bare minimum of signatures
 4 and then it downloaded all the rest of the ones that it
 5 needed. I don't know.
 6 And that's been my problem with this entire
 7 thing the entire time, is that I can't recreate the
 8 Internet and all these systems as they were in 2006
 9 or -7 and nobody's gone through the trouble of doing
 10 that for me and presenting it to me and saying, here you
 11 go, Scott, go to town, have fun. We are going to give
 12 you access to all of these systems where we know where
 13 they came from or we know how they were put together and
 14 where we know these servers had these signature files in
 15 them, etcetera, etcetera, ad nauseam.
 16 **Q. I understand that. But without that**
 17 **information -- which we both agree, I think, is**
 18 **critical -- how can you make the judgment that**
 19 **WinAntivirus offers similar features to those offered by**
 20 **the leading products in the industry? Don't you need**
 21 **more information to draw that conclusion?**
 22 A. Again, it comes back to taking it on good faith;
 23 that when you see software set up to work in a certain
 24 way and that it is doing -- that it's reading these
 25 files -- that it is going through and reading all the

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1 files, when I can see it doing that, and then I see that
 2 it catches on that one file, I assume it is reading
 3 those files and it is checking that file and it is
 4 checking it against its signature database. It is doing
 5 that.
 6 But whether or not that is -- you are right.
 7 You are right. A more comprehensive understanding of
 8 the signatures that are in there and how often it
 9 updates, those would be important things to say that it
 10 is just as good as those other software tools. But for
 11 me to say that it functions as those do, I think
 12 that's fair.
 13 **Q. So maybe we don't disagree here. What you are**
 14 **saying is that WinAntivirus functions similarly to other**
 15 **leading software in that it scans and that it attempts**
 16 **to draw signatures from a database; is that correct?**
 17 A. Yes.
 18 **Q. But what you are not saying is that it is as**
 19 **effective as leading -- and this is an important**
 20 **distinction -- that it is as effective as leading**
 21 **products in the industry, because you don't have the**
 22 **information to make that judgment.**
 23 A. Right. And I don't believe I made that -- I
 24 don't believe I said that.
 25 **Q. I don't think you did either. I just want to**

<p style="text-align: right;">269</p> <p>1 clear up when you say "offers similar features," I 2 originally read that as you saying it is as effective. 3 And maybe that's my fault. 4 You are not ready to say that at this point. 5 You are just saying that it appears to go through the 6 same motions that other leading programs do. 7 A. That's right. And that's why we are talking 8 now, to clear up things like that. I think it is 9 brilliant. 10 Q. Fair enough. Okay. We are done with that 11 exhibit -- no, we have one more question on that. 12 You say in the report that WinAntivirus runs 13 system scans -- which I think we have talked about -- 14 and then you also say it is capable of detecting viruses 15 and handling them in an industry-standard manner. And 16 I'm not sure I see the data supporting the second half 17 of that statement. 18 A. It quarantines them. I believe it quarantines 19 the virus. It removes the file and removes it from the 20 system. 21 Q. But there weren't any real viruses on your 22 machine. 23 A. The ability to remove a file -- you know, 24 certainly the ability to detect a file that's a virus -- 25 and certainly not all -- yeah, I can stand by that. I</p>	<p style="text-align: right;">271</p> <p>1 removing that type of threat. Whether or not it can get 2 in and remove things, the higher -- again, it goes to 3 quality, right? Whether or not it is capable of 4 removing the more advanced types of threats that are on 5 a system, things aren't loaded into RAM or, for example, 6 root kits, I would question McAfee and Symantec on some 7 of that. Because I have seen it where McAfee can't 8 remove a virus, Symantec can't remove a virus, and I end 9 up just going in and rooting it out myself. 10 Q. I understand. But based on the data you have 11 got, you have established that WinAntivirus -- to your 12 satisfaction you've established that WinAntivirus can 13 detect the two test files that you put on the machine; 14 right? 15 A. Yes. 16 Q. But as far as actual malicious viruses, that 17 just wasn't a test that you ran and you have explained 18 why that is; right? 19 A. I think that the trojan simulator is supposed to 20 simulate a malicious virus. In and of itself it is not 21 malicious, but for all intents and purposes the system 22 is agnostic to the intent of a thing. Even real viruses 23 your system doesn't know -- it doesn't know the 24 difference. 25 Q. Okay. Let's move on. You tested the free</p>
<p style="text-align: right;">270</p> <p>1 would want -- certainly I would want -- not even the 2 best antivirus software can remove successfully all 3 viruses, and I -- I could agree that that would need 4 further testing to make sure. 5 Q. Based on the data you have at this point, you 6 can't really say whether it can detect viruses and 7 handle them in an industry-standard manner because you 8 have never had it detect a virus; right? 9 A. The trojan simulator, I would probably want to 10 give you more information about how that works. I 11 believe it actually does behave in the same way as a 12 trojan behaves. 13 Q. Is it a malicious file? 14 A. It does the same sorts of things and it behaves 15 in the same way that something that wanted to do 16 something malicious could. I mean, in and of itself the 17 command window could be used for malicious purposes, so 18 the existence of a certain file in a certain type -- say 19 you have a file that's capable of making a call to a 20 remote server and downloading software to the site, you 21 know, that -- and it is put in the place where these -- 22 we won't know it is there, it is not registered 23 properly, you don't see it, that would be a trojan, a 24 back door of sorts. 25 And that's what -- it is capable of at least</p>	<p style="text-align: right;">272</p> <p>1 version of WinAntivirus; right? 2 A. Yeah. That was the 3 WinAntivirus2005ProScannerSetup. 4 Q. I don't want to put words in your mouth, but my 5 understanding is you tested the free version of 6 WinAntivirus. 7 A. My understanding is that the 8 WinAntivirus2005ProScannerSetup is the free version, so 9 let me take a look at that section. Yes. 10 MR. ARENSON: We can mark this as the next 11 exhibit. 12 (Ellis Exhibit Number 12, Rebuttal Report of 13 Kevin Johnson, was marked for identification.) 14 BY MR. ARENSON: 15 Q. Okay. So I'm going to introduce Exhibit 12, 16 which is actually a document we have talked about to 17 some length today. This is the expert report of Kevin 18 Johnson. This is the rebuttal report. And we are going 19 to flip to page 13 of this report and talk about 20 Mr. Johnson's tests of the same programs that you 21 tested. 22 A. This? 23 Q. Yes. So Mr. Johnson visited the MSN website and 24 then ran the WinAntivirusPro2005, the same program you 25 tested, and he got the following warning from</p>

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1 **WinAntivirusPro: Your system is infected. So I want to**
 2 **just break this down by line.**

3 Now, do you agree that what was detected here,
 4 the cookie from -- that was detected, which is from
 5 Doubleclick, is an infection of the computer? Is that
 6 an industry-standard term, you are infected with a
 7 cookie? I'm not making this stuff up.

8 A. I don't know if it is an industry-standard term
 9 or not. I wouldn't refer to it that way.

10 **Q. Have you heard a lot of your colleagues say my**
 11 **machine is infected with cookies?**

12 A. I wouldn't put it past having been heard that I
 13 have got an adware infection, or that I'm -- I don't
 14 know exactly what people would say, you know, I'm
 15 polluted with cookies or I'm -- I have got a lot of
 16 cookies. I don't know exactly what people would say.

17 I think that if I were to say that I had a piece
 18 of software that was looking for cookies and I found
 19 cookies, then there is cookies. I think that the word
 20 infection --

21 **Q. It is a loaded term; right?**

22 A. It is not a term that really makes sense to use
 23 with computers at all. When you think about it
 24 semantically, we use a lot of -- what's the word I'm
 25 looking for, when you apply human attributes to an

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1 object.

2 MS. GURLAND: Personification.

3 A. Onamonapia. I'm not sure.

4 BY MR. ARENSON:

5 **Q. But I think --**

6 A. Anthropomorphization, I think that's the word.

7 THE WITNESS: You don't need to type that one.

8 MR. ARENSON: Unfortunately she does.

9 BY MR. ARENSON:

10 **Q. So the root of that -- and correct me if I'm**
 11 **wrong -- is that viruses, which also affect humans, and**
 12 **the root of a person being infected with a virus is why**
 13 **a computer would also be termed infected; right? The**
 14 **root is a virus; right?**

15 A. Malware would really be a better word than
 16 virus. I think that certainly there is -- everything
 17 falls into that category. Virus is the -- the word
 18 infection is just something that has been associated
 19 with the word virus and it comes down to a question of
 20 language and I'm not a language expert on the semantics
 21 of how people talk about things.

22 **Q. But it is safe to say that not a lot of people,**
 23 **or any people, say that my system is infected with**
 24 **cookies. Have you ever heard anyone say that? I'm**
 25 **infected with cookies, Scott. Ever heard it?**

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1 A. I don't recall having heard that.

2 **Q. Okay. Now, the next representation from this**
 3 **program is WinAntivirusPro has detected viruses, adware**
 4 **trojans, and performance issues on this computer.**

5 And let's go through those one by one. Now, a
 6 cookie isn't a virus; right?

7 A. I would say no.

8 **Q. Okay. What's a trojan?**

9 A. A trojan is something that's on your computer
 10 that could be -- could release things within the
 11 security zone of your computer that you may not want to
 12 be released, just like trojans. It comes back to -- the
 13 Greek tale of Troy and --

14 **Q. I think you've got it. I always understood --**
 15 **and correct me if I'm wrong -- a trojan to be something**
 16 **that hides within something else and then infects a**
 17 **user.**

18 A. Yeah, it would typically be an executable.

19 **Q. An executable that hides within something else**
 20 **and then tricks the user into installing it. Is that**
 21 **pretty much what people understand trojans to be?**

22 A. Yes.

23 **Q. Okay. So how is a cookie an adware trojan? Or**
 24 **is it?**

25 A. Yeah. I think that may be a typo. Maybe there

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1 was supposed to be a comma in there. Adware, trojan, or
 2 maybe it is not. Maybe it is considering a cookie to be
 3 an adware trojan and that something could come along
 4 later and pick that cookie up.

5 Certainly adware -- a cookie would be part and
 6 parcel of adware in that adware is not going to function
 7 to some degree. Certain types of adware probably
 8 wouldn't function if the cookies aren't there.

9 **Q. But the trojan part is the part that troubles**
 10 **me. How is a cookie a trojan? What's hiding inside the**
 11 **cookie that would infect the computer and cause harm?**

12 A. Well, it could be information about your
 13 computer that's there or about you, information about
 14 you.

15 **Q. But it is not an executable.**

16 A. No. But it could be part of an executable
 17 program.

18 **Q. Have you ever heard anyone refer to a cookie as**
 19 **a trojan? Scott, my computer is infected with cookie**
 20 **trojans?**

21 A. That would be like saying, you know -- I don't
 22 know what that would be like saying.

23 **Q. Have you ever heard of it?**

24 A. Let me think a minute. I mean, it is saying
 25 adware trojans and cookies could be part of that.

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1 Cookies would be part of adware, so what somebody would
2 say is that my computer is infected with adware.

3 **Q. That's not what this says, right? This says**
4 **adware trojans.**

5 A. I have never heard the term adware trojans
6 before, no, but it not unreasonable to put those two
7 words together.

8 **Q. Give me an example of an adware trojan.**

9 A. That would be one that's capable of highjacking
10 your browser session and highjacking the contents of its
11 choice that's maybe even stored locally on your machine.
12 I've seen entire Internet caches of websites stored on
13 people's local machine and the contents have been served
14 up to the person.

15 **Q. Okay. Do you have an opinion whether a**
16 **Doubleclick cookie is an adware trojan?**

17 A. My opinion on that is that there is too many ads
18 on the Internet and that it is almost unbearable, the
19 amount of advertising that you see on the Internet. And
20 that if there is a program that could keep me from
21 seeing banner ads -- the constant onslaught of banner
22 ads that we see is -- it is obnoxious.

23 And that's like the definition of adware. Is it
24 obnoxious? Does it get in your way? Is it causing
25 problems? Is it creating files on your computer? Is

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1 there a little blinking thing down on the bottom of your
2 screen when you are trying to read a report or a message
3 board, something that somebody has useful information
4 on? It is annoying.

5 **Q. Right.**

6 A. And those cookies are a big part of how that
7 system works. I think they could still make it work
8 even without cookies but it wouldn't be as targeted.
9 They wouldn't be able to target me directly, and that's
10 what's offensive, is sometimes I will be surfing along
11 and I will be working and I see an advertisement for
12 something that I'm actually interested in and it is
13 distracting.

14 **Q. Understood.**

15 A. And that's a problem for corporate America. I
16 would say that the amount of time lost in America by
17 people surfing the Internet because they got distracted
18 by some pretty banner ad is probably huge.

19 **Q. I hear you, but let's try to get back to the**
20 **question, which was would you define a Doubleclick**
21 **cookie as an adware trojan?**

22 **You said that's not a term you've heard before;**
23 **right?**

24 A. It is not unreasonable to put those two words
25 together. I'm not sure that I haven't seen that.

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1 **Q. Where would you have seen adware trojan?**

2 A. You may have seen it -- certainly it is a -- I
3 would have seen that. I think -- the more I think about
4 it, the more sense it makes, that there could be
5 trojans -- that there are trojans on your computer that
6 are serving up content to people.

7 And especially at that time. It was a lot worse
8 in 2004, 2005, 2006. It was very prevalent that people
9 would lose their -- their browser would be highjacked
10 and they would be served up content that they didn't
11 want and there would be popups and popovers and
12 pop-arounds. I think the term is reasonable, adware
13 trojans.

14 And I think that companies that engage in the
15 practice of dumping lots of cookies onto my machine and
16 then serving ads up to me and tracking what I'm doing
17 and where I'm going, I feel it is invasive and invades
18 my privacy, and I feel those companies are adware
19 and that --

20 **Q. Understood.**

21 A. -- the cookies are part of their adware program.

22 **Q. Understood. So is it safe to say that virtually**
23 **all consumers have cookies on their computers?**

24 A. If they are browsing the Internet --

25 **Q. That's an important --**

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1 A. -- and their computer is configured to allow
2 cookies and they are not running a software tool that's
3 removing them, then it would be safe to say that they
4 have cookies.

5 **Q. You have told me before that consumers aren't**
6 **particularly sophisticated when it comes to the Internet**
7 **in general and that most consumers aren't very**
8 **sophisticated. So is it safe to say that most consumers**
9 **who connect to the Internet have cookies on their**
10 **computer and are not running special software to block**
11 **them?**

12 A. I think these days it is safe to say that people
13 are more savvy about that.

14 **Q. Is your wife running that software?**

15 A. Wife is running an antivirus tool, yeah,
16 definitely.

17 **Q. There is a difference, though, between an**
18 **antivirus tool and blocking cookies; right?**

19 A. My wife goes to Facebook and that's about it.

20 **Q. Facebook uses cookies, doesn't it?**

21 A. Yeah. But she's not browsing all over the place
22 and it's not something that she's complained to me
23 about.

24 **Q. I understand. But it is very likely there are**
25 **cookies on your wife's computer.**

<p style="text-align: right;">281</p> <p>1 A. It is very likely that there is many, many 2 people that have -- that are actively guarding their 3 computers against cookies. 4 Q. But your wife isn't one of them. 5 A. I don't know how that's relevant, and I almost 6 find it offensive. 7 Q. I apologize. I don't mean to -- the only reason 8 it is relevant to this is that you are a computer 9 expert, and if your own wife has cookies on her 10 computer, then I guess I just -- I don't see how the 11 wife of a computer expert is not even more sophisticated 12 than a typical consumer. And if your wife allows 13 cookies on her computer, I would think that even less 14 sophisticated consumers would be even more likely to 15 allow cookies on their computer. 16 I apologize for any other inference. There was 17 none there. Do you agree with at least that theory? Or 18 maybe I can put this another way. 19 A. I think I -- 20 Q. You haven't -- 21 MS. GURLAND: Can he answer? 22 MR. ARENSON: If he wants. I'm just trying to 23 get out of this. 24 A. I think that -- I have in the past run tools on 25 her -- on that computer, on her computer, to clean out</p>	<p style="text-align: right;">283</p> <p>1 cookies and not allowing them onto your machine. 2 A. Yes. There would be machines where cookies 3 would have been turned off. The problem became as more 4 and more pieces of software depended on cookies to 5 operate properly, that became a difficult setting to 6 maintain because it wouldn't work. 7 Q. Right. 8 A. It was kind of like you just had to take it. 9 Q. And I'm not making any judgment as to whether 10 that's right or wrong. I'm saying there were cookies on 11 your machine; correct? 12 A. That would be correct. 13 Q. So if you had run WinAntivirusPro on your 14 machine, it would have detected the same adware trojans 15 that it detected here. 16 A. Unless I had just run CCleaner. 17 Q. Now, the last question on this performance 18 issue. Can one cookie cause a performance issue on a 19 computer? 20 A. Probably not. 21 Q. Okay. We are done with that. 22 MR. ARENSON: You can mark this as 13. 23 (Ellis Exhibit Number 13, Advertisements from 24 Value Click Network, was marked for identification.) 25 ///</p>
<p style="text-align: right;">282</p> <p>1 things, and one of the things that would be cleaned 2 out -- I believe I have run CCleaner on that machine. I 3 would have to check. I don't maintain my wife's 4 computer. I apologize. I'm going to go home tonight 5 and apologize to her for not doing as good of a job of 6 maintaining her computer as I should. 7 Because it is true. I take better care of my 8 machine than her machine, and when I was working in this 9 industry -- when I was doing my job that gave me the 10 expertise on this, yes, I was running tools to clean out 11 cookies on people's computers all the time. 12 BY MR. ARENSON: 13 Q. Okay. 14 A. It was a common practice to install some sort of 15 adware preventative measure at this time. Now, whether 16 I'd do this today, now? The problem isn't as prevalent 17 with the security risk that cookies present. But at the 18 time as a professional for clients that were paying me 19 money to take care of their systems, yes. 20 Unequivocally, yes, I removed cookies from their 21 machines. 22 Q. But removing cookies and blocking cookies is a 23 different issue, and what you haven't told me yet is 24 were you affirmatively blocking cookies in all instances 25 and every time you surfed the web you were blocking</p>	<p style="text-align: right;">284</p> <p>1 BY MR. ARENSON: 2 Q. This is actually going to be somewhat of a 3 strange exhibit because it may not apply to you. 4 A. Okay. 5 Q. This is a series of advertisements that Marc 6 D'Souza purchased and ran on the Value Click network. 7 A. Okay. 8 Q. And if you just flip through these, you will see 9 that there is all kinds of different variations of 10 basically the same ad. 11 A. Oh, my goodness, yeah. 12 Q. Do you intend to offer any testimony about 13 whether these ads are false or misleading? Because it 14 is not mentioned in your report and I'm just trying to 15 determine if you are going to offer testimony about 16 these ads. 17 MS. GURLAND: If it is not mentioned in his 18 report, he could not legally do that. 19 MR. ARENSON: Well, there is a lot of things 20 that you've have been talking about updating today that 21 aren't mentioned in his report so I'd like to nail this 22 down. 23 BY MR. ARENSON: 24 Q. Are you going to offer any testimony about these 25 ads, whether they are false or misleading?</p>

<p style="text-align: right;">285</p> <p>1 MS. GURLAND: Can I represent -- maybe it is 2 hard for him to know. I represent that we are not going 3 to offer testimony -- 4 MR. ARENSON: Okay. 5 MS. GURLAND: -- about that. If it is not in 6 his report and he hasn't disclosed it to you and -- that 7 would be not just something like, oh, I would like to do 8 another test. That would be a whole new topic area that 9 wasn't in his report. I wouldn't go through the effort 10 of trying to introduce that, which I think would not be 11 appropriate. 12 MR. ARENSON: I would tend to agree. 13 BY MR. ARENSON: 14 Q. But the only thing that gives me a little bit of 15 pause is that in one of the lists of things you 16 considered I think you referenced just generically 17 Mediaplex. 18 A. Yeah, I think there was some question as to -- I 19 mean, I may certainly offer my opinion as to how 20 something like this -- how that sort of thing works but 21 not as to whether -- 22 MS. GURLAND: Can I just say there was in -- 23 MS. ROBBINS: It is on page 9. 24 MS. GURLAND: -- in Johnson's rebuttal report 25 there was discussion of the investigation that was done</p>	<p style="text-align: right;">287</p> <p>1 he talks about about SWF files and GIF files that touch 2 on it, but in terms of vouching for those particular 3 advertisements and offering an expert opinion that was 4 not done in his report, I will not seek to have him do 5 that in the future. 6 MR. ARENSON: Okay. And the only thing I need 7 to clarify is there mention in his report about the SWF 8 file. There is a brief discussion of that. There is no 9 discussion of the GIF files. 10 A. There actually is. I think that I can tell you 11 to the extent that my report mentions it -- and all I'm 12 saying -- and the only thing I'm saying is that I would 13 never rely on a single GIF or SWF file to conclude what 14 an entire website of network of websites does. And 15 that's the end of my opinion on that. 16 BY MR ARENSON: 17 Q. But these aren't part of a website. These are 18 banner ads that ran on the Value Click Media Network. 19 So are you intending to offer an opinion on these 20 banner ads? 21 A. Does the Media Click Value Network, was it their 22 websites -- did these banner ads appear on websites that 23 were under their control where the entire code behind 24 the website, where the ad appeared, that website was 25 under Media Click's control?</p>
<p style="text-align: right;">286</p> <p>1 from Mediaplex, perhaps on the first page where he shows 2 the wrapper code and then Johnson says that he obtained 3 it by the investigation done by Mediaplex. 4 So one of the things I gave to Scott, which he 5 may or may not have read, is that investigation from 6 Mediaplex. So it is listed in his materials in the 7 abundance of caution that he put everything that he 8 possibly looked at and that's the basis. 9 MR. ARENSON: I'm not making any judgment as to 10 whether that was right or wrong. I just don't want to 11 get ambushed. 12 BY MR. ARENSON: 13 Q. So I'm just trying to see if you are going to be 14 offering any opinions. If you are, I have got pages of 15 questions about these ads, but if you are not going to 16 offer an opinion, then those questions aren't relevant 17 to you. 18 A. Are you going ask me about them? 19 Q. It depends. Are you going to testify about 20 them? Are you intending to testify about -- 21 A. If she's not going to ask me about them and 22 you're not -- 23 MS. GURLAND: No. I'm going to represent that 24 we are not going to -- he can talk about the things that 25 are in his report, because there are certain things that</p>	<p style="text-align: right;">288</p> <p>1 Q. These ads appeared on thousands, if not tens of 2 thousands, of websites in the Value Click Media Network, 3 and we actually have the code that was used to 4 display it. 5 A. But the code from the website -- because 6 certainly you can have conditional code on a website 7 that can be based on cookies. 8 Q. See, this is what we are going to need to get 9 into if you are going to offer expert testimony on this. 10 You haven't yet and there is all kinds of questions 11 about business logic on the Value Click server and the 12 Media Click server. Believe me, it is complicated. 13 And so far you haven't dove into it, but if you 14 are going to, I need to ask you a whole series of 15 questions, and I just need to know if you're planning to 16 offer testimony on this product. I will be happy to 17 take Carolyn's word for it or your word for it. 18 MS. GURLAND: He will not be offering testimony 19 on anything other than -- other than what is in his 20 report. So to the extent that these -- how it is 21 phrased in his report, he might want to testify about 22 that, but there is -- he was not -- I will represent to 23 you -- and we'll do it this way, and if you'd like you 24 can add Colleen because now I will make sure that he 25 can't legally do it, and I will tell you that this</p>

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1 Exhibit 13 is not anything that's listed in the
 2 materials that he relied upon in rendering his expert
 3 opinion in his report.
 4 These were not materials that he considered or
 5 relied upon in reaching his conclusions, and he is not
 6 going to come up with new opinions that were not
 7 disclosed to you during the discovery phase of
 8 this case.
 9 MR. ARENSON: I think that answers it.
 10 BY MR. ARENSON:
 11 Q. The only remaining part -- and I'm sorry to be
 12 difficult here -- is that actually is an exhibit created
 13 by the FTC. Those files were included, I believe, in
 14 this disk that you have listed. You have listed one of
 15 the things you considered is the Mediaplex disk, which
 16 has hundreds of thousands of files on it, I think, a lot
 17 of files. And these files are part of that gigantic
 18 mass of files.
 19 MS. GURLAND: Okay.
 20 BY MR. ARENSON:
 21 Q. In your report you haven't made any discussion
 22 of the targeting of these ads or how they were displayed
 23 or the business logic, and there are other expert
 24 witnesses in this case who have waded into this area. I
 25 just need to know whether you are intending to wade into

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1 it area or not. You haven't in your report. Are you
 2 intending to offer new additions to your testimony going
 3 forward?
 4 A. I don't think that I can, because I don't have
 5 the code. I don't have the business logic. I don't
 6 have the materials to be able to do that.
 7 Q. Fair enough.
 8 Okay. Last topic on my outline.
 9 MR. ARENSON: Let's go off the record for a
 10 minute.
 11 (An off-the-record discussion was had.)
 12 MR. ARENSON: All right. Back on the record.
 13 BY MR. ARENSON:
 14 Q. The last topic for today, from us, is page 17 of
 15 your report. This is Internet marketing and FTC
 16 e-mails.
 17 A. Okay. Is that like the last page?
 18 Q. I don't think so. Nope. It is kind of in the
 19 middle.
 20 A. All right.
 21 Q. Okay. So you state in here that it is not
 22 possible to conclude with reliability that the subject
 23 ads are the same as the ads placed by Ms. Ross or to
 24 conclude that she was in any way responsible for the
 25 functioning of the ads.

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1 And you proceed to give A through J and these
 2 are the reasons, the bases, for your conclusion, and I
 3 want to go through these one by one.
 4 So for "A" you say there are hundreds of
 5 thousands, if not millions, of PCs and servers that have
 6 been compromised; right?
 7 A. Certainly.
 8 Q. Okay. Is there any evidence in your possession
 9 that a compromised PC or server was involved in this
 10 particular case?
 11 A. There is no forensics at all, and that's the
 12 point that I'm trying to make with all of these. Is
 13 that when -- for example, I got contacted by an attorney
 14 talking about whether or not his client sent an e-mail
 15 to somebody. He was accused of sending the e-mail and
 16 he says he didn't send it. And what the attorney wants
 17 to know is did he send it.
 18 The first thing I do is say do you have a
 19 forensic image of his computer? We can look at the
 20 forensic image of his computer and we can ascertain if
 21 it is there. If it is not there, it doesn't mean it was
 22 never there, but certainly if we find it, that means
 23 that he did send it. I'm all about like -- this is a
 24 very difficult situation. Maybe I don't fully
 25 understand what's going on but the forensics is an

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1 important side of things.
 2 Q. And just to get back to my question: Do you
 3 have any evidence that you can point me to that there
 4 was a compromised PC or server involved in this
 5 particular case? And if you do, let me know.
 6 A. Neither supporting nor not supporting it.
 7 Q. And then you say in "B" that time on slave
 8 networks of computers can be purchased on the black
 9 market. Can you point me to any evidence of which you
 10 are aware that a slave network of computers was involved
 11 in this particular case?
 12 A. I can't point to it one way or the other.
 13 Q. Next you say browser highjacking by malware was
 14 common. Can you point me to any evidence of which you
 15 were aware that browser highjacking was involved in this
 16 case?
 17 A. I have no evidence suggesting either yes or no.
 18 Q. "D" you say PCs were easily infected in 2004.
 19 Do you have any evidence that an infected PC was
 20 involved in this case? Anything you can point me to?
 21 A. Just statistically speaking, if we were to look
 22 at the numbers of how many computers were involved,
 23 there may be a certain -- and that's probably true with
 24 any of these. You can do statistical sampling. That's
 25 not my forte.

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1 **Q. But any evidence you can point me to**
 2 **specifically in this case?**
 3 A. I think statistical evidence can be pretty
 4 powerful.
 5 **Q. Do you have any?**
 6 A. I can get some. I think I mentioned it here,
 7 hundreds of thousands, if not millions. I don't have
 8 the exact numbers.
 9 **Q. So any evidence you can point me to at this**
 10 **point today?**
 11 A. Not right at this moment, but I would certainly
 12 be happy to undertake that research. Again, time was
 13 very limited on this report.
 14 **Q. And when you prepared this report, did you have**
 15 **any evidence?**
 16 A. I had done the research on the Internet and
 17 looked up like statistically where that -- I can't
 18 remember the exact sites I looked at. It was likely
 19 from Symantec or something like that that listed a
 20 number of infections in certain years. And I have seen
 21 the evidence. I have gone to lectures and I have --
 22 there is a company -- I can't remember the name of it --
 23 security expert, it was -- you know, put graphs up on
 24 the board showing the number of infections in PCs
 25 worldwide, showing where they were phoning home to.

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1 And I would have to look for that and access it
 2 to demonstrate and show -- because there are people that
 3 have done the homework on that.
 4 **Q. Would you ever be able to definitively prove to**
 5 **me that an infected PC was involved in this case?**
 6 A. I would have to hire -- we would have to have
 7 another expert on that, because the other expert would
 8 have to show and explain through statistical reasoning
 9 why something is a statistical probability.
 10 **Q. Understood. So as of right now you don't have**
 11 **the evidence.**
 12 A. No.
 13 **Q. Now, E through I are all about affiliates. Can**
 14 **you point me to any evidence that affiliates were**
 15 **involved in this case?**
 16 A. No. This was five years ago -- or four years
 17 ago that this went on. This was the Internet as it
 18 existed. I don't know. I don't think that I'm saying
 19 that -- I'm just making statements about the conditions
 20 in the environment at the time when this happened.
 21 **Q. Is it safe to say that these are theories about**
 22 **what could have happened?**
 23 A. If the evidence were presented to me -- yeah,
 24 that's safe to say.
 25 **Q. These are theories about what could have**

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1 **happened.**
 2 A. Yes.
 3 **Q. But you don't have any hard evidence to support**
 4 **these theories at this point.**
 5 A. That was my litany, was a complaint that I don't
 6 have that. That's what I want to see.
 7 **Q. Right.**
 8 A. And I'm not seeing it and I wish it would be
 9 given to me so that we could say, oh, this is not what
 10 the problem was. We don't know.
 11 **Q. Right. So for any of your theories, A**
 12 **through J, can you point me to any evidence that would**
 13 **prove them based on what you know right now?**
 14 A. That's a real broad question, and let me just
 15 maybe break that down. When you say "evidence," you
 16 mean evidence pertaining to this particular -- like
 17 specific computers where we would be able to say that
 18 this particular affiliate was fraudulent or not?
 19 **Q. Right. You have come up with a bunch of**
 20 **theories as to what could have happened, but what I'm**
 21 **asking is do you have any evidence to back these up, or**
 22 **is this just this could have happened but I can't say**
 23 **for sure whether it did or not?**
 24 A. That would be an accurate statement.
 25 **Q. Okay. Give me five minutes to just go over my**

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1 **notes but we very well may be done.**
 2 MR. ARENSON: Off the record.
 3 (A brief recess was taken.)
 4 MR. ARENSON: Okay. Back on the record. FTC
 5 has no further questions. Mr. Ellis, thank you very
 6 much for your time today.
 7 THE WITNESS: You are welcome.
 8 EXAMINATION
 9 BY MS. GURLAND:
 10 **Q. Some follow-up questions. Mr. Ellis, when you**
 11 **started the examination today, you talked about some of**
 12 **your global concerns that you had with the -- all of the**
 13 **forensic methodology in the case, and I was just**
 14 **wondering if you wanted to just expand on what problems**
 15 **do you feel that -- I mean, relatively briefly, what are**
 16 **the main problems that you feel exist in this case which**
 17 **you were referring to when you said that?**
 18 A. I really feel there is no strong forensic
 19 foundation with respect to what forensics really mean,
 20 which is all about preservation and knowing where things
 21 came from and when they were in play and having images
 22 of the machines that were involved at the time, you
 23 know, when the behavior occurred.
 24 This is such -- the scope of this is so large
 25 that understandably rewinding the Internet to the time

<p style="text-align: right;">297</p> <p>1 when this happened would be very difficult.</p> <p>2 Q. When you say "this," you mean when the products</p> <p>3 that are the subject of this case were evidently</p> <p>4 marketed and sold? Is that the "this"?</p> <p>5 A. Yes. And it also refers to the entire</p> <p>6 affiliate -- the network, the affiliates, the people</p> <p>7 presenting the ads, the methods they were using to sell</p> <p>8 the software, everything that's involved in that.</p> <p>9 It would be really -- it would really be</p> <p>10 beneficial to see more information about that and to</p> <p>11 have been given that information up front as opposed to</p> <p>12 having to, you know, look for it, hunt for it, try to</p> <p>13 figure out what the other guy was looking at, you know,</p> <p>14 trying to do an examination almost in the dark.</p> <p>15 Q. Okay. And as you sit here, given the way that</p> <p>16 you were -- that the -- say the binary programs that we</p> <p>17 have been talking about, the ones that you have in your</p> <p>18 report, the WinFixer and the WinAntivirus, the programs</p> <p>19 that you analyzed in your report, given the way that</p> <p>20 those products were delivered to you, do you have any</p> <p>21 doubts about whether or not they were the actual</p> <p>22 products that IMI ever sold to customers? Do you know</p> <p>23 that they were or they weren't?</p> <p>24 A. I believe that in my report -- can I see my</p> <p>25 report? These images that I used to access these</p>	<p style="text-align: right;">299</p> <p>1 that helps determine where the files are coming from.</p> <p>2 Then they get the IP address and they trace it</p> <p>3 back to the owner of that IP address and then they</p> <p>4 execute a search warrant. And this is the world I'm</p> <p>5 used to working in, and this is vastly different in that</p> <p>6 that doesn't appear to have happened, and I'm not sure</p> <p>7 of the origin of the files that I have looked at.</p> <p>8 I have done what I can do to examine the files</p> <p>9 in ways that I know how to examine them, but to the</p> <p>10 degree that I can speak to the accuracy, I can't speak</p> <p>11 to that at all.</p> <p>12 Q. Okay. And there was some questions about the</p> <p>13 lack of testing of some of the free products. For</p> <p>14 example, WinFixerFree and DriveCleanerFree. And just</p> <p>15 for clarity, I think you had indicated those were</p> <p>16 products you would like to test.</p> <p>17 Has there ever been any instruction from counsel</p> <p>18 not to test the free version of WinFixer and</p> <p>19 DriveCleaner? Or, to the contrary, do you have a</p> <p>20 recollection that that would be something that counsel</p> <p>21 would have liked to have done if there was time?</p> <p>22 A. I think that was something we would have liked</p> <p>23 to do, but my recollection is that we didn't do it</p> <p>24 because we didn't know which ones he was looking at</p> <p>25 because we did not receive -- the Johnson report did not</p>
<p style="text-align: right;">298</p> <p>1 files -- you know, here we have one that says file</p> <p>2 acquired 03/03/2010, that's -- and it was really just</p> <p>3 a -- just a copy of what -- it appeared to be a copy of</p> <p>4 a drive.</p> <p>5 And, just to be clear, a forensic copy of a</p> <p>6 drive is not a forensic image of the original, so it is</p> <p>7 kind of like we are getting away from first principles</p> <p>8 where somebody creates a copy of a computer and all the</p> <p>9 file-created dates are in sequence, that pretty much</p> <p>10 demonstrates that this is a copy that was made.</p> <p>11 And then you take a forensic image of that copy</p> <p>12 that was made, that doesn't make it a -- that doesn't</p> <p>13 make it forensic just because somebody used EnCase to</p> <p>14 create the copy. They may as well have just created a</p> <p>15 copy of the drive and sent to it me. I'm not sure why</p> <p>16 it was a forensic image.</p> <p>17 You know, I certainly spoke to that in my</p> <p>18 report. When you are examining what's going on and when</p> <p>19 people have -- an infection is happening with their</p> <p>20 computer, you would want to be able to capture that,</p> <p>21 capture files -- when you are capturing files from the</p> <p>22 Internet from external forces -- and this happens in law</p> <p>23 enforcement all the time. They use a version of</p> <p>24 WireShark. They use a geo-location tool built into</p> <p>25 WireShark that's built specially for law enforcement and</p>	<p style="text-align: right;">300</p> <p>1 list MD5 hashes, and then I had to give my report, and</p> <p>2 then in his rebuttal report he came back and gave the</p> <p>3 MD5 hashes, which was -- I won't speak to that.</p> <p>4 Q. Were there MD5 hashes -- I will represent to you</p> <p>5 that there were not MD5 hashes in the Johnson second</p> <p>6 report, the rebuttal report, either for WinFixerFree or</p> <p>7 DriveCleanerFree.</p> <p>8 A. I don't believe there are.</p> <p>9 Q. I have no recollection of MD5 hashes. Maybe I</p> <p>10 shouldn't represent it without seeing it. I don't</p> <p>11 remember for those two that there were MD5 hashes.</p> <p>12 MS. GURLAND: So I guess since we have talked</p> <p>13 about doing other tests, I guess I would wonder if there</p> <p>14 were WinFixer -- or a WinFixerFree product and a</p> <p>15 DriveCleanerFree product for which he has an MD5 hash,</p> <p>16 would it be possible for him to provide us the ones that</p> <p>17 he tested so we can run the same --</p> <p>18 MR. ARENSON: The WinFixerFree product is the in</p> <p>19 the report. It has an MD5 hash.</p> <p>20 MS. GURLAND: I need to see the report.</p> <p>21 MR. ARENSON: The rebuttal report?</p> <p>22 MS. GURLAND: Yes.</p> <p>23 THE WITNESS: The hashes that are in here are</p> <p>24 for ErrorPatrol, PerformanceOptimizerFree, and</p> <p>25 WinAntivirus2005ProScannerSetup.</p>

<p>301</p> <p>1 MS. GURLAND: So, again, I would -- I don't -- I 2 continue not to see anyplace in the Johnson report where 3 the hash values have been provided for the WinFixer or 4 DriveCleaner free versions, nor do I see those products 5 as even being products that he tested. 6 MR. ARENSON: If you look at -- there is no 7 page numbers. That makes it difficult. But if you 8 start at the last page and work backwards, one, two, 9 three, four, five, six pages back, you'll find the MD5 10 hash for WinFixer2005ScannerSetup. 11 MS. ROBBINS: On the bottom. 12 THE WITNESS: This is the rebuttal report. 13 MS. GURLAND: Okay. So in the rebuttal report 14 there is one for WinFixer -- I now see it -- and there 15 is one for DriveCleaner as well? Is that accurate? 16 MR. ARENSON: That I would have to check. 17 MS. GURLAND: Okay. 18 BY MS. GURLAND: 19 Q. Anyway -- 20 A. Did we see an MD5 hash for the WinFixerFree? 21 Q. Yes. But not one for the DriveCleaner. 22 Now that there is an MD5 hash, is there any -- 23 has there ever been any conversation between you and 24 counsel that indicated that they wouldn't want the free 25 products of those tested?</p>	<p>303</p> <p>1 clean and to remove entries that have a certain feature 2 to them as opposed to looking at the exact reason or the 3 ancestry of the item, which may or may not be possible 4 to figure out and you may have to have an extremely 5 large database to find that out. 6 So that's really what I was talking about there, 7 was just that there is areas it is custom and practice 8 to keep clean and that the softwares that keep those 9 areas clean are completely -- again, the word agnostic, 10 as to what's in there and they just get rid of it. 11 BY MS. GURLAND: 12 Q. So when you say the software that does that, 13 what software are you aware of that cleans out items in 14 the registry and is agnostic about what it finds there? 15 What products are you aware of that operate like that? 16 A. Well, I mean, like CCleaner is one of my 17 favorites and I have mentioned that a lot today. That 18 would be one that cleans that stuff out and it just -- 19 it doesn't say that it is bad or good. It just says, 20 you know, this stuff just needs to go away, and then it 21 gets rid of it. 22 Q. And do you know, as you sit here, the 23 advertisements that CCleaner and other security products 24 that people would refer to or that you might refer to as 25 standard in the industry, are you aware of the ads that</p>
<p>302</p> <p>1 A. No, I don't recall any -- anyone saying don't do 2 that, no. 3 Q. Okay. And, indeed, with respect to any of the 4 products, there was no direction to tell you what to do; 5 is that right? That you couldn't do something? 6 A. Right. 7 Q. Because -- and, just to be clear, if counsel 8 would have told you, here's a hard drive, and I'm 9 instructing you you may not run those tests, would you 10 have agreed to the engagement? 11 A. Probably not. 12 Q. Okay. When we were talking about some of the 13 different registry keys and prefetch keys and cookie 14 keys, I made a note that you had made a comment that 15 software can't differentiate semantically and does a 16 text search, or something along those lines. 17 And I was wondering, could you explain exactly 18 what you mean by that? And when you say "software," did 19 you mean just the products that you looked at or do you 20 mean software generally? 21 MR. ARENSON: Objection to Windows prefetch 22 keys. It is nonsensical. 23 A. I think that what I was referring to was that 24 there are certain areas of the computer where it is a 25 common practice and custom to simply keep those areas</p>	<p>304</p> <p>1 that they ran in the 2005 through -7 time period? Do 2 you know all the ads that they ran? 3 A. My recollection would be the software at that 4 time was -- security software in general was very 5 adamant about making sure you don't have threats on your 6 computer. I don't recall with specifics anything in 7 particular. 8 I do know that the security -- the whole ad 9 environment at that time with respect to security was 10 trying to get the word out and trying to get people to 11 download products that would clean their computers of 12 these problems that Windows XP had, and then Windows 13 Service Pack 2 came out, which was a giant leap forward 14 for Microsoft in terms of security in that they 15 acknowledged that there were problems with Windows XP, 16 and Service Pack 2 installed a whole new level of 17 security for Windows. 18 Q. And the products that you would -- the security 19 software products that you would categorize as being 20 standard in the industry in 2005 through 2007, are you 21 aware of any of those products running ads that alerted 22 that there were errors or even serious or severe errors 23 on a customer's computer? 24 A. A lot of those products did offer on-line 25 scanning tools. I know that Panda was one that offered</p>

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1 an on-line scanner that warned you. And that was one of
2 the largest antivirus firms.

3 I'm not sure today what their standing is, but I
4 was running the Enterprise version of Panda at a
5 network, and I basically found it because one of the
6 other consultants I worked with said, you know, this is
7 a -- you can get onto this website and run the scanner
8 and it will tell you if you have infections and it will
9 can clean them off.

10 **Q. And with respect to the 2005 through 2007 period**
11 **and other security software products that were**
12 **considered standard in the industry, are you aware of**
13 **instances in which those security products issued**
14 **warnings to customers based on things that the scan**
15 **would have found in the customer's computer?**

16 A. Well, I certainly did see warnings from Panda
17 when I scanned computers when the computer was infected,
18 but it was with respect to viruses. It believed the
19 computer had viruses, which that was the reason I was on
20 the site in the first place, because the computer was
21 behaving in a way that I knew it had a virus, lots of
22 RAM being eaten up, lots of disk activity.

23 **Q. In terms of registry cleaner security software**
24 **products in the 2005 to 2007 time frame, do you have any**
25 **recollection of what those ads looked -- what ads, if**

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1 **you have seen any, looked like?**

2 A. No, I don't have any specific recollection. I
3 do know that I did see a lot of ads for registry
4 cleaners and that they would advertise the fact that
5 having corrupt or invalid registry entries would cause
6 problems. It does bring to mind one -- Norton Disk
7 Utilities, which I think later became part -- you know,
8 Norton became Symantec or Symantec bought Norton. I'm
9 not sure of the -- I'm not sure of the business side of
10 things, what happened there.

11 But they did have a tool called Norton Disk
12 Doctor that would purportedly clean registry problems
13 and it was advertised as being something that would find
14 severe errors, and I did run it on my computer and it
15 did say I had severe registry errors. I don't recall
16 what the errors were but they were ones that would cause
17 problems according to the tool.

18 And I ran the tool and I did not have a good
19 result with that tool. The computer never worked again
20 after that. So the registry is a very complex thing and
21 even big companies like Norton -- it is tough. It is a
22 real tough thing. The Microsoft Windows box is very
23 complex and a lot of stuff is very much removed from
24 where it used to be.

25 Things have gotten a lot more complex. There is

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1 lots of layers now and data streams that are being
2 accessed, and then I think it was in -- I don't want to
3 go back in time too much here.

4 **Q. Okay. Now, I'm going to refer you to certain**
5 **pages in the rebuttal report of Kevin Johnson, which is**
6 **Exhibit 12 for the record. And specifically I want to**
7 **show you two of the warning boxes in Mr. Johnson's**
8 **report that he discussed; one for ErrorPatrol, which is**
9 **on the sixth page of his report. And it starts at the**
10 **top, 318 severe system -- or 318 severe errors detected;**
11 **do you see that?**

12 A. Yes.

13 **Q. Okay. And looking at that warning box, can you**
14 **show me -- can you show me where on that warning box**
15 **that you see that ErrorPatrol is telling the user that**
16 **every -- that a single file by itself causes -- is very**
17 **likely to cause further problems if not fixed**
18 **immediately?**

19 **Where does it say that just one file by itself**
20 **will cause -- where does ErrorPatrol tell the user that**
21 **just one file by itself is very likely to cause these**
22 **things, or does it say that at all?**

23 A. It doesn't say that.

24 **Q. What does it say?**

25 A. It says that the errors found on your computer

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1 are very likely to create further problems if not fixed
2 immediately.

3 **Q. And the errors, is that referring to 318 severe**
4 **system threats?**

5 A. Yes.

6 **Q. So does ErrorPatrol then take any -- make any**
7 **particular representation about any single one of the**
8 **threats, or does it rather express a warning about all**
9 **of the threats together that it found?**

10 A. It is talking -- this is likely a system
11 variable that just is put into there and this text would
12 be the same regardless of that number, because you can
13 even see where it is a slightly different font.

14 **Q. Right. But my question to you is is it**
15 **differentiating between individual files that it found**
16 **or is it telling you that the total number of files are**
17 **the threat that's very likely to create further**
18 **problems?**

19 A. I don't believe the software differentiates.

20 **Q. Well, you can see -- I mean, from what it says,**
21 **if we are talking about -- we are not talking about the**
22 **functionality of the software now. We are talking about**
23 **advertisement that's shown. Does the advertisement tell**
24 **the user that it is just one file or is it talking about**
25 **a group of files together?**

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1 MR. ARENSON: I'm going to object to the extent
2 Ms. Gurland is asking the witness to read and interpret
3 something that is readable and interpretable by
4 everyone. There is no special expertise that Mr. Ellis
5 has in interpreting the English language, I think, so I
6 think this entire line of questioning is improper.
7 MS. GURLAND: Your objection is noted.
8 BY MS. GURLAND:
9 **Q. And you can answer, because we have had a great**
10 **deal of testimony about this particular language all day**
11 **long.**
12 A. The line of text doesn't say -- it doesn't come
13 out and say any one of these can cause a problem. It is
14 saying the errors. So I believe it is assuming there is
15 going to be plural errors and more than one.
16 **Q. And then turning to the PerformanceOptimizer,**
17 **which is four pages further from there -- and not the**
18 **Portuguese one, sorry. I will go with the WinFixer and**
19 **the page that starts, 120 severe errors detected.**
20 **Same question. Is WinFixer -- is this**
21 **advertisement -- or this advertisement that we are**
22 **looking at here indicating that it is just one file**
23 **that's going to -- that's very likely to cause further**
24 **problems or is it referring to a number of files?**
25 A. I don't think that's what it is trying to

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1 say, no.
2 MR. ARENSON: Objection; lacks foundation as to
3 what the program is trying to say.
4 MS. GURLAND: Okay.
5 BY MS. GURLAND:
6 **Q. I'm not asking about the functionality of the**
7 **program. I'm just asking about the advertisement and**
8 **the same advertisement that we have talked about today.**
9 A. My answer is the same; that it is not coming out
10 and saying there is just one threat that would cause a
11 problem.
12 **Q. Okay. We talked a little bit about antivirus,**
13 **the -- your analysis of WinAntispyware and WinAntivirus,**
14 **the free unpaid versions of that, earlier this**
15 **afternoon; do you remember that testimony?**
16 A. Yes.
17 **Q. Okay. And one of the -- one of the topics was**
18 **the things that you were able to do and what you weren't**
19 **able to do to analyze those antivirus programs; do you**
20 **remember that?**
21 A. Yes.
22 **Q. Or antispyware in this case.**
23 A. Sure.
24 **Q. Can you explain why it is not possible in the**
25 **instance of, say, WinAntivirus, why couldn't you go and**

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1 **figure out what file it was accessing now in 2010 or**
2 **2009 when you did it?**
3 A. Well, the server that it was talking to isn't
4 there anymore.
5 **Q. So it is not a problem in your methodology,**
6 **is it?**
7 A. No.
8 **Q. Is it an impossibility to access a server that's**
9 **gone?**
10 A. Without the server, it is -- you can't access a
11 server that's not there.
12 **Q. We talked a little bit about the test files, two**
13 **test files, a trojan test file and the -- I don't know**
14 **if we talked about it with the name, but is the other**
15 **file called an ICAR file?**
16 A. Yeah.
17 **Q. Were those -- what were those files -- if you**
18 **know, what were -- the simulated trojan file and the**
19 **ICAR file, what were they designed to do, if you know?**
20 A. I think the purpose of them is to allow you to
21 test the functionality of maybe -- you know, like for a
22 developer testing the functionality of his software, he
23 would put the entry so that he doesn't have to work with
24 real viruses to develop it. He would be able to create
25 a signature database and maybe his signature database --

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1 the developer's signature database would have just one
2 entry or two entries for these viruses and then the
3 purpose would be to run his tool and make sure he can
4 find these test files on the system.
5 **Q. Is there a reason to use these test files on the**
6 **system rather than to just go ahead and put real viruses**
7 **on your system?**
8 A. It is dangerous to put viruses on your computer.
9 They can be activated -- yeah, inadvertently activated.
10 That would not be good, and it is not something -- for
11 the same reason you don't want to play around with
12 viruses in a laboratory.
13 **Q. Right. So in your experience with computers, is**
14 **the use of an ICAR file or the simulated trojan file to**
15 **evaluate antivirus software a valid exercise?**
16 A. It is a valid exercise.
17 **Q. And the -- we have had a number of discussions**
18 **today about some other tests that you would like to run**
19 **if you had more time; is that right?**
20 A. Yes.
21 **Q. And other things you would like to follow up on;**
22 **right?**
23 A. Yes.
24 **Q. And there were areas of the registry that you**
25 **said that you wanted to learn more about what those keys**

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<p style="text-align: right;">313</p> <p>1 definitely did; is that right?</p> <p>2 A. Sure.</p> <p>3 Q. Let me ask you, Mr. Ellis, does any of these</p> <p>4 things that you said you would like to follow up on, any</p> <p>5 of those things that you said you would ideally like to</p> <p>6 do, any of those things change the opinions that you</p> <p>7 have expressed in your report about the -- the fact that</p> <p>8 the programs that you tested functioned in -- you know,</p> <p>9 functioned appropriately, as you have said, or</p> <p>10 functioned as operated -- I think we have changed the</p> <p>11 term to operated -- as other products that were standard</p> <p>12 in the industry?</p> <p>13 A. I think with respect to the antispyware one, I</p> <p>14 would like to be able to test that one further.</p> <p>15 Q. Okay.</p> <p>16 A. With the antivirus one, I believe that if I were</p> <p>17 to able to get my hands on the database of viruses from</p> <p>18 2006, and if that was an appropriate thing for me to</p> <p>19 do -- which they may be contraband, I'm not sure -- that</p> <p>20 would be an exercise that would be -- would further, I</p> <p>21 think, support my testimony.</p> <p>22 Q. But my question was, putting aside the fact that</p> <p>23 there are things you say that you would do to even</p> <p>24 become more comprehensive or more clear, does any of</p> <p>25 that that you have said change the opinions that you</p>	<p style="text-align: right;">315</p> <p>1 turn to the elusive page 17 of your report in which we</p> <p>2 talked about your certain conclusions A through -- I</p> <p>3 have got the wrong one -- A through J, the last topic.</p> <p>4 A. Yes.</p> <p>5 Q. Okay. And then directing your attention to your</p> <p>6 conclusion in that section, two conclusions, that I want</p> <p>7 to talk to you about in particular.</p> <p>8 First, "It is my opinion that it is not possible</p> <p>9 to conclude with reliability that the subject ads are</p> <p>10 the same as the ads placed by Ms. Ross"; do you see</p> <p>11 that?</p> <p>12 A. Right.</p> <p>13 Q. And, "It is not possible to conclude with</p> <p>14 reliability that she was in any way responsible for the</p> <p>15 functioning of the ads"; do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. Could you tell me -- and tell us all --</p> <p>18 what information you would need in order to make those</p> <p>19 two conclusions with reliability? What are the things</p> <p>20 that you would need to -- what is the information you</p> <p>21 would need to have to make those conclusions with</p> <p>22 reliability?</p> <p>23 A. I would want to see an e-mail perhaps from</p> <p>24 Ms. Ross to whoever was placing -- you know, to whoever</p> <p>25 was controlling the ad content saying change this or</p>
<p style="text-align: right;">314</p> <p>1 have rendered in the expert report that you have?</p> <p>2 A. No, I don't think so.</p> <p>3 Q. You don't think so?</p> <p>4 A. No, it doesn't change -- the opinion that was</p> <p>5 asked of me and the opinion that was presented in the</p> <p>6 report were different, and it had a different spirit</p> <p>7 behind them, what I was trying to show with the</p> <p>8 antispyware ones, so my opinion does not change at all.</p> <p>9 The software does not make claims of spyware</p> <p>10 being there when spyware is not there. That was the</p> <p>11 point of that exercise and my opinion of -- my results</p> <p>12 from that exercise have not changed.</p> <p>13 And, likewise, with the antivirus, the point of</p> <p>14 the exercise was to demonstrate that it functioned; that</p> <p>15 it could find a test virus and it did. At that level it</p> <p>16 is a functioning piece of software. It is not what we</p> <p>17 would call vaporware.</p> <p>18 Q. So is it fair to say you stand by your report?</p> <p>19 A. I stand by my report.</p> <p>20 Q. Apart from the revision, I think, to the --</p> <p>21 saying that the government endorsed, but apart from that</p> <p>22 you stand by the content of your report; is that</p> <p>23 accurate?</p> <p>24 A. Yes.</p> <p>25 Q. Okay. And then lastly, Mr. Ellis, I want to</p>	<p style="text-align: right;">316</p> <p>1 something to show that she was involved. And my</p> <p>2 understanding -- correct me if I'm wrong -- is that she</p> <p>3 submitted an ad and that ad changed. I have no evidence</p> <p>4 that tells me that she's the one that changed it.</p> <p>5 I couldn't see anything that allowed me to</p> <p>6 conclude that she's the one that changed it. Based on</p> <p>7 an e-mail, it was her response that she would attempt --</p> <p>8 research and attempt to fix the problem. And, again,</p> <p>9 from what I have, it is a single thread of e-mail, it is</p> <p>10 hard to draw any comprehensive conclusions about what is</p> <p>11 going on.</p> <p>12 Q. What type of forensic evidence would you want to</p> <p>13 see to make a conclusion as to who it was that was</p> <p>14 changing the content of an Internet ad? What would you</p> <p>15 need to see?</p> <p>16 A. There would certainly be FTP logs that would be</p> <p>17 on the server maybe; FTP logs that were preserved from</p> <p>18 the time period that could say, okay, at this time we</p> <p>19 see that this ad was loaded, this is the one that</p> <p>20 Ms. Ross gave us or that Ms. Ross loaded, and then at</p> <p>21 this time it changed and became something and, you know,</p> <p>22 you could see that in the FTP log.</p> <p>23 I don't know the -- I don't know the method</p> <p>24 behind how banner ads were transmitted to these</p> <p>25 companies, so, again, I don't know and that's</p>

1 information I don't have, I have not been given. I
2 can't -- and this is where I come up with it is not
3 possible to conclude with reliability -- with what I
4 have, I can't conclude with reliability with any
5 reasonable degree of forensic certainty. I can't say
6 that anything happened or how it happened. All we can
7 kind of do is look at the mess that we have here.

8 MS. GURLAND: Okay. Thank you.

9 MR. ARENSON: Give us just one minute. I think
10 we have a couple of questions on redirect.

11 (A brief recess was taken.)

12 MR. ARENSON: Mr. Ellis, we take it back. We
13 are done. We'll waive signature.

14 (Whereupon, at 4:28 p.m., the deposition was
15 concluded.)
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1 CERTIFICATION OF REPORTER

2 DOCKET/FILE NUMBER: 08-CV-3233

3 CASE TITLE: FTC v. INNOVATIVE MARKETING, INC., et al.

4 DATE: September 30, 2010
5

6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the deposition in the above cause taken
9 by the FEDERAL TRADE COMMISSION to the best of my
10 knowledge and belief.

11 DATED: 10/11/2010
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14 LYNETTE J. NEAL,
15 CSR-RPR
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